83-952

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN R. WILSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether, in a quiet title action brought by the United States as trustee for the Omaha Indian Tribe, sovereign immunity bars the trespassers from asserting a counterclaim against the United States for the value of improvements they placed on the lands in issue during the time they were wrongfully in possession.

PARTIES TO THE PROCEEDING

The parties asserting a counterclaim for improvements, respondents herein, are John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson. Other respondents under Rule 19.6 of the Rules of this Court are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, Travelers Insurance Company, the State of Iowa, the State Conservation Commission of the State of Iowa, and the Omaha Indian Tribe.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-14a; App. C, *infra*, 18a-23a) are reported at 707 F.2d 304. The opinion of the district court (App. F, *infra*, 28a-79a) is reported at 523 F. Supp. 874.

JURISDICTION

The initial judgment of the court of appeals was entered on October 26, 1982 (App. B, *infra*, 15a-17a). Petitions for rehearing were filed by some of the respondents herein, and the court of appeals thereafter issued a modified opinion (App. C, *infra*, 18a-23a). A new judgment was entered on June 10, 1983 (App.

D, *infra*, 24a-26a). The United States' petition for rehearing of the decision as modified was denied on August 11, 1983 (App. E, *infra*, 27a). On October 31, 1983, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the jurisdiction of the federal courts to entertain counterclaims seeking monetary relief against the United States when the government initiates a quiet title action to establish ownership and regain possession of land belonging to an Indian tribe. That question is presented here only in respect of some 2,200 acres finally determined to be part of the Omaha Indian Reservation, the title to which is held by the United States for the benefit of the Tribe. *Omaha Indian Tribe* v. *Wilson* (*"Omaha II"*), 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980). See App. A, *infra*, 4a. Although no title issue remains open as to these lands, the court of appeals has now held, upon petition for rehearing in subsequent proceedings relating to additional lands not before this Court, that, as a condition of taking title to the 2,200 acres, the United States must reimburse the trespassers for the value of their improvements. App. C, *infra*, 18a-23a. For present purposes, therefore, the underlying facts are of little relevance and are, in any event, already familiar to this Court. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). In these circumstances, we summarize the complex history of the case as briefly as possible.[1]

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[1] This case has been the subject of numerous decisions; in chronological order, those decisions are: *United States* v.

1. A treaty entered into on March 16, 1854, between the Omaha Indian Tribe and the United States resulted in the creation of the Omaha Indian Reservation along the west (or right descending) bank of the Missouri River in what was then the Territory of Nebraska. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 658-659 & n.4. In 1867, a survey by T.H. Barrett of the General Land Office established that, at that time, the Missouri River, where it was the boundary of the reservation, looped sharply to the east, creating a "lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa." *United States* v. *Wilson*, 433 F. Supp. 67, 69 (N.D. Iowa 1977). Throughout this litigation, this lobe has been referred to as the Barrett Survey area.

Over the years, the Missouri River has shifted its course many times—so often, in fact, that the States of Iowa and Nebraska, whose common boundary the River was, in 1943 entered into an Interstate Compact establishing a fixed boundary between them. See *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). This fixed boundary, though, was not congruent with the River as it existed in 1943 (see *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 659 n.6), or as it exists today. In fact, the Barrett Survey area, once west of the Missouri River and thus immediately contiguous to

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Wilson, 433 F. Supp. 57 and 433 F. Supp. 67 (N.D. Iowa 1977), vacated and remanded *sub nom. Omaha Indian Tribe* v. *Wilson*, 575 F.2d 620 (8th Cir. 1978), vacated and remanded, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979); remanded to district court, *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980); *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981), reversed and remanded, *United States* v. *Wilson*, 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983).

the Indian reservation, is now east of the Missouri River and therefore separated from the other lands of the reservation. See *id.* at 659. For many years prior to 1975, non-Indians farmed the lands within this cutoff loop and claimed ownership of those lands (*id.* at 659-660).

2. In 1975, the United States brought an action to quiet title, as trustee for the Omaha Indian Tribe, to "all those lands now lying within the Barrett Survey, approximately 2900 acres, and extending to the center of the main channel of the Missouri River as it existed when the Reservation was created." *United States* v. *Wilson*, 433 F. Supp. at 70.[2] At about the same time, the Tribe brought two actions in federal court, seeking relief similar to that sought by the United States, but with two important differences. First, the Tribe sought to quiet title in itself to a larger area (encompassing approximately 11,000 acres); in addition, the Tribe sought damages for the claimed illegal trespasses. *Ibid.* The Tribe's claim of title to the additional acreage, as well as its claim for damages, was severed from the suit brought by the United States. "This left the 2900 acres within the Barrett Survey as the subject matter of this [litigation] since the dispute over that land is common to all three lawsuits." *Id.* at 69.

The United States and the Tribe based their claim to the lands within the Barrett Survey area on the theory that the Missouri River had changed its course avulsively (see generally *Arkansas* v. *Tennes-*

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[2] Certain so-called "fee-patented lands," totalling approximately 400 acres, were excepted from the claim of the United States. These lands had earlier been allotted to individual members of the Tribe and subsequently sold to non-members. See *United States* v. *Wilson*, 433 F. Supp. at 70.

see, 246 U.S. 158, 175 (1918)), and, accordingly, that the boundary of the reservation did not move but remained in the middle of the channel of the Missouri River as it existed at the time of the change. The defendants, on the other hand, argued that the River's migration westward had been by the natural and gradual processes of erosion and accretion and that the boundary of the reservation therefore retreated westward with the River. See *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660.

Applying the legal principles established by this Court in *Wilson* v. *Omaha Indian Tribe*, *supra*, the court of appeals on remand ordered title to approximately 2,200 of the 2,900 acres claimed by the United States to be quieted in the United States as trustee for the Tribe. *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980).[3] The present petition does not involve any title issues, but instead relates to that portion of the court of appeals' decision (App. C, *infra*, 18a-23a) requiring the United States to pay respondents[4] for

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[3] The question of title to the remaining 700 acres within the Barrett Survey area—being the so-called "fee-patented lands" not claimed by the United States (see page 4, note 2, *supra*) and lands claimed by the State of Iowa—as well as the claim of the Omaha Indian Tribe to lands outside the Barrett Survey area and its claim for damages remain to be decided by the district court. The district court, in its latest ruling, quieted title to the remaining 700 acres in the Tribe and the United States as trustee for the Tribe (App. F, *infra*, 28a-70a), but the court of appeals concluded that the district court had applied an incorrect burden of proof as to those lands and accordingly reversed and remanded that aspect of the case for further proceedings. (App. A, *infra*, 1a-14a).

[4] As used in this petition, "respondents" refers only to those parties seeking compensation from the United States for im-

the value of improvements made upon the 2,200 acres of land within the Barrett Survey area to which title has been quieted in the United States as trustee for the Tribe.

3. In the answers filed by respondents in the quiet title action instituted by the United States (No. C 75-4024 (N.D. Iowa)), respondents counterclaimed for a judgment quieting title in themselves and for "such other relief as the Court may find justified * * *." Upon remand from the court of appeals after title had been quieted in the United States as trustee, respondents announced that "such other relief" encompassed the value of improvements placed upon the land by them or their predecessors in interest.[5] Respondents argued that general principles of equity are binding on the United States and that, as a condition precedent for obtaining equitable quiet title relief, the government must do equity by reimbursing them for the improvements referenced above (App. F, *infra*, 70a). As an alternative basis for recovery, respondents argued that Nebraska law entitled them to recover for improvements, relying on

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provements placed upon the land while they were wrongfully in possession, and not to parties who are respondents in this Court only by virtue of Rule 19.6 of the Rules of this Court.

[5] The district court in one of its earlier decisions described the land in question as having been "cleared of trees, leveled, fenced, drained, roads built, and cultivated." *United States* v. *Wilson*, 433 F. Supp. at 69. These are, apparently, the improvements for which respondents now seek compensation. The district court noted that, with these improvements, the land "is now a valuable and productive tract of farm ground, as evidenced by the purchase of 2,180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000, approximately 1780 acres of which is within the Barrett Survey and the subject of this trial." *Ibid.*

the Nebraska Occupants and Claimants Act, Neb. Rev. Stat. §§ 76-301 to 76-311 (reissue 1981) (App. F, *infra*, 70a).[6] The district court rejected respondents' arguments, holding that the sovereign immunity of the United States barred any counterclaim for improvements and that Congress has not consented to the application of the Nebraska statute to lands owned by the United States in trust for the Omaha Indian Tribe (*id.* at 70a-76a).

In its initial decision entered on October 26, 1982, the court of appeals thought it was unnecessary to rule on the viability of respondents' counterclaim because the issue appeared not to be ripe for decision (App. A, *infra*, 13a n.11):

> [Respondents] also appeal the district court's denial of their request for the value of improvements they made to Barrett Survey land during their possession of it. It is our understanding that the improvements were made solely on the particular tracts of land in controversy here, and not on the trust lands with respect to which this court has already indicated title must be quieted in the Tribe and the United States.[7] If

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[6] In pertinent part, the Nebraska statute requires that the successful claimant in a quiet title action must either pay for the improvements on the property or return them to the trespasser. If the successful claimant fails to do either, then the trespasser may regain title by paying into court the value of the real estate without improvements. See App. F, *infra*, 76a & n.26.

[7] The "particular tracts of land in controversy here" are the 700 acres as to which the court of appeals held that the district court had applied an erroneous burden of proof in determining that title should be quieted in the United States and the Tribe. See page 5 note 3, *supra*.

we are correct, then clearly we need not rule on this issue in view of our remand.

Respondents sought rehearing, claiming, inter alia, that improvements had been made to the lands on which title had been quieted in the United States as trustee for the Tribe, thus making it necessary for the court to rule on the sovereign immunity issue (App. C, *infra*, 21a). The court of appeals granted rehearing on that issue and reversed the district court's ruling in favor of the United States (*id.* at 23a). The court of appeals held that, as a general rule, the plaintiff in a quiet title action must do equity by reimbursing the party in wrongful possession for the value of improvements as a condition precedent to the plaintiff's right to relief (*id.* at 21a). The court found no reason not to apply this doctrine to the United States. "[T]he duty to pay for the value of improvements," the court held, "is an element of the government's own claim, a condition precedent to the right of the United States to recover" and "does not arise as a result of finding adverse to it on a counterclaim by the [respondents]" (*id.* at 22a-23a). Accordingly, the court of appeals determined that the doctrine of sovereign immunity was simply "inapplicable" (*id.* at 23a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals conflicts with decisions of this Court holding that in the absence of statutory authorization courts do not have jurisdiction over counterclaims against the United States. See *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). In this quiet title action brought by the United States on behalf of the Omaha

Indian Tribe, no statute authorizes respondents' counterclaim for the value of improvements placed on the land. Accordingly, the court of appeals was plainly wrong in requiring the United States, which had sought no trespass damages from the respondents, to pay respondents for the value of improvements the United States did not ask to be made.

The court of appeals' decision could have a substantial adverse effect on the many quiet title actions brought by the United States each year, both on its own behalf and in its capacity as trustee for the Indians. In carrying out its obligations on behalf of Indians and the general public to recover wrongfully occupied lands, the United States may be subjected to significant and unexpected liabilities. While the government could protect itself in part by seeking trespass damages against which counterclaims for improvements could be offset, it should not be forced to elect to seek trespass damages in all cases. Indeed, in many quiet title actions, including the present one, the United States decides on equitable grounds to forego trespass damages to which it would otherwise be entitled in recognition of the fact that the defendants may be "innocent" trespassers. But such governmental self-restraint obviously does not sanction courts to super-impose their own notions of equity as conditions on the United States' right to bring suit. The clear conflict with this Court's decisions barring unauthorized counterclaims, along with the importance of the issue to the government, warrants review by this Court.[8]

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[8] Although the court of appeals remanded the case to the district court for further proceedings relating to respondents' claim for the value of the improvements (App. A, *infra*, 23a & n.1), there is no reason to postpone review by this Court. The

1.a. In *United States* v. *Shaw*, *supra*, this Court clearly held that, absent a statute so providing, the courts do not have jurisdiction over cross-claims against the United States. There, a statute (the Act of March 3, 1797, formerly codified at 28 U.S.C. (1940 ed.) 774, now codified at 28 U.S.C. 2406) allowed cross-claims, but only up to the amount of the government's claim. In a companion case to *Shaw*, *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, no statute authorized the cross-claim (against an Indian Tribe that enjoyed immunity comparable to that of the United States), and the Court accordingly held that the cross-claim could not be maintained. Some years earlier, the Court explained in *Nassau Smelting & Refining Works, Ltd.* v. *United States*, 266 U.S. 101, 106 (1924), that:

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

See also *Illinois Central R.R.* v. *State Public Utilities Commission*, 245 U.S. 493, 504-505 (1918).

In the present case, there is no statute authorizing respondents' counterclaim. Section 2406 of Title 28, as interpreted by the Court in *Shaw*, limits cross-

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district court's decision on remand cannot alter the rule of law announced by the court of appeals; the court of appeals' determination that the United States must pay the value of improvements as a prerequisite to judgment quieting title in itself is a clearcut ruling that controls the further conduct of this case. As such, it warrants review by this Court now. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

claims to the amount of the government's claim. But the government sought no money judgment, having eschewed any demand for trespass damages or mesne profits. Thus, respondents do not (and could not) contend that they fall within the scope of 28 U.S.C. 2406.[9]

b. As the district court recognized (App. F, *infra*, 72a-73a), in the absence of statutory authorization which is here lacking, respondents could recover on a counterclaim against the government only by asserting a theory of recoupment arising out of the same transaction as the claim of the United States, and only if the counterclaim did not seek relief in excess of, or different in kind from, that sought by the United States. This apparent exception is permitted because a counterclaim based on recoupment is in reality a defense to the government's claim for relief, rather than a separate, unconsented suit against the sovereign. Accordingly, since the ultimate goal of awarding damages in a trespass action is to make the plaintiff whole, a defendant who in good faith has increased the value of the premises may offset the value of the improvements against the damages or the mesne profits sought. The claim for improvements in the nature of recoupment would be, in a trespass action, a defense to the claim for damages,

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[9] Clearly, the Nebraska statute cited by respondents (see pages 6-7 & note 6, *supra*) cannot defeat the sovereign immunity of the United States. The court of appeals did not rely on that statute, and even respondents did not contend that it is actually controlling. Instead, they argued only that a court of equity should look to the state statute in the exercise of its equitable powers. See App. F, *infra*, 75a. As the district court recognized (*id.* at 76a), that argument is foreclosed by sovereign immunity.

and the courts have long recognized that in such cases an offset may be asserted without infringing on the doctrine of sovereign immunity. See, *e.g.*, *Bull* v. *United States*, 295 U.S. 247 (1935); *Oneida Indian Nation* v. *County of Oneida*, Nos. 82-7436, 82-7486 & 82-7526 (2d Cir. Sept. 29, 1983), slip op. 6744-6746. In this quiet title action, however, the fact that respondents may have improved the land is not a defense to the relief sought by the United States, and thus they cannot assert a counterclaim for improvements under a theory of recoupment.

c. Notwithstanding these well-settled limitations on counterclaims against the United States, the court of appeals professed to avoid the bar of sovereign immunity by asserting that respondents' counterclaim for improvements is not really a counterclaim at all but is instead "an element of the government's own claim, a condition precedent to the right of the United States to recover * * *" (App. A, *infra*, 22a-23a). The court then invoked the oft-repeated maxim that one seeking equity must do equity and cited a number of cases that allegedly support the application of that doctrine to the United States (*id.* at 22a).

In fact, however, the cases were wrongly relied upon. One of this Court's decisions cited by the court of appeals (App. A, *infra*, 22a) actually supports precisely the result for which we argue. In *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456 (1927), the United States sought the cancellation of contracts and leases obtained by fraud and bribery arising out of the Teapot Dome scandal. It obtained that relief in the district court but was also ordered to pay the defendants the value of construction work performed under the contracts, fuel

oil furnished to the Navy at Pearl Harbor, and the cost of drilling and operating oil wells. This Court unequivocally rejected the defendants' counterclaims. Although the Court noted that "[t]he general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract," the Court held that those principles "will not be applied to frustrate the purpose of its laws or to thwart public policy." 273 U.S. at 506. The Court went on to distinguish the United States from a private litigant because the public policy of vindicating the integrity of the petroleum reserves transcended the financial aspects of the litigation.[10]

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[10] The court of appeals cited a number of other cases (App. A, *infra*, 22a), all of which contain general language to the effect that the United States, when seeking equity, is as bound to do equity as a private suitor. But, as with *Pan American Petroleum & Transport Co., supra*, the cited cases either do not reach the result reached by the court of appeals here, or they involve entirely different factual circumstances.

United States v. *Detroit Timber & Lumber Co.*, 200 U.S. 321 (1927), involved a factual situation totally distinct from the present case. There, the United States recovered, from a person who had wrongfully sold timber on federal lands, both the land in question and the money received for the sale of the timber. The United States then sought to recover from Detroit Timber & Lumber Co., a good faith purchaser of the timber, the money paid to the wrongdoer. This Court refused to countenance such a double recovery by the United States, noting that "[t]he Government has every dollar which it would have received in case of a perfectly valid entry, and has also recovered the land. Surely it is not just for it to ask further payment * * *." *Id.* at 340.

Many of the lower court cases cited by the court of appeals correctly hold that the courts *lack* jurisdiction over counterclaims against the United States. See, *e.g.*, *United States* v.

In support of its holding in *Pan American Petroleum & Transport Co.*, the Court cited *Heckman* v. *United States*, 224 U.S. 413 (1912), a suit brought by the United States to cancel conveyances of allotted Indian lands on the ground that the conveyances were made in violation of the restrictions on the Indians' power of alienation. The Court there refused to order return of the purchase price as a condition precedent to cancellation, reasoning that any such requirement would frustrate Congress's policy of protecting the Indians. In the present case, the United States brought suit to vindicate that same policy, and there is no reason why the government's right to relief should be conditioned upon paying for improvements that neither it nor the Indians asked to be made.

Moreover, federal courts historically have attached special significance to claims for Indian title. They have acknowledged that such suits are often brought

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Second National Bank of North Miami, 502 F.2d 535, 548, 549 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975); *Sierra Club* v. *Hickel*, 467 F.2d 1048, 1052 (6th Cir. 1972), cert. denied, 411 U.S. 920 (1973); *Ehrlich* v. *United States*, 252 F.2d 772 (5th Cir. 1958). The court of appeals in the present case cited the *dissenting* opinion in *Ehrlich*, apparently by mistake (see App. A, *infra*, 22a).

Other cases cited by the court of appeals fall in the category of recoupment actions, in which the claimed off-set arose directly out of the same transaction that formed the basis for the government's claim. See, *e.g.*, *Lacy* v. *United States*, 216 F.2d 223, 225-226 (5th Cir. 1954). Finally, the court cited cases involving claims by the government for specific performance of a contract, in which the courts held that to be entitled to such relief the government must itself perform its obligations under the contract. See, *e.g.*, *United States* v. *Bedford Associates*, 618 F.2d 904, 919 (2d Cir. 1980); *Jacobs* v. *United States*, 239 F.2d 459 (4th Cir. 1956), cert. denied, 353 U.S. 904 (1957).

belatedly because of the past inability of the Indian people to defend their lands. Accordingly, they have ruled that state statutes of limitations do not bar such claims (*Ewert* v. *Bluejacket*, 259 U.S. 129, 137-138 (1922); *Capitan Grande Band of Mission Indians* v. *Helix Irrigation District*, 514 F.2d 465 (9th Cir.), cert. denied, 423 U.S. 874 (1975)); that common law rules of pleading do not oust federal court jurisdiction (*Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974)); and that the federal common law of laches cannot be applied to Indian title claims (*Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1084 (2d Cir. 1982)). The court of appeals' decision is contrary to the underlying policy that permits the assertion of these claims without regard to rules ordinarily applicable in private litigation.

In any event, the court's assumption that it must order reimbursement for improvements in order to "do equity" (App. A, *infra*, 21a) is incorrect. Respondents have been wrongfully in possession of Indian lands for many years, enjoying the use of the lands together with the profits from the produce thereof. Yet the United States has not sought compensation for rents and profits. Equity surely does not demand that respondents recover for whatever made their wrongful tenure more comfortable or their gain the greater. Cf. *United States* v. *Louisiana*, 446 U.S. 253, 266-272 & n.4 (1980).

2. The court of appeals' decision threatens to have a serious adverse impact on the administration of Indian affairs. Despite the fact that only Congress has the authority to divest an Indian tribe of its property rights (25 U.S.C. 177), the net effect of the decision is to condition the quieting of title on payment for improvements. As a practical matter, therefore,

the court of appeals' decision will require the government to appraise the value of improvements made by trespassers on Indian lands before making a decision to sue to regain possession of the lands for the rightful Indian owners.[11] Conceivably, the government could find that the United States' risk of monetary liability in the event it prevailed in a quiet title action would outweigh the appraised value of the unimproved estate; consequently, budgetary constraints could compel a decision not to assist the dispossessed Indian landowners. The Indians may in turn sue to compel the United States to represent them in its capacity as their trustee, or they may seek damages in the United States Claims Court for a breach of trust in failing to protect their property interests. While prosecutorial discretion could be advanced as a defense to such suits, our experience has been that this type of litigation is not without risks. See, *e.g.*, *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975); *Covelo Indian Community* v. *Watt*, 551 F. Supp. 366 (D.D.C. 1982), vacated as moot, No. 82-2377 (D.C. Cir. Feb. 1, 1983).

The prospects of such dilemmas are quite real and potentially enormous. Pursuant to Sections 3 and 4 of the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1977-1978, the Secretary of the Interior was required to publish in the Federal Register two lists of potential Indian damage claims subject to the statute of limitations for causes of action brought by the United States (28 U.S.C. 2415). On

[11] The reasoning of the court of appeals would seem to apply with equal force to suits brought by the United States to secure possession of public lands occupied by trespassers. As explained below, however, the adverse effects of the decision will have their most serious impact in Indian cases.

March 31, 1983 (48 Fed. Reg. 13698), and November 7, 1983 (48 Fed. Reg. 51204), over 38,000 potential claims were listed, half of which involve claims of title not subject to the statute of limitations but which provide the underlying basis for a claim of trespass damages. Section 5 of the Act, 96 Stat. 1978, requires the Secretary to prepare reports to the Indians on all listed claims that are rejected for litigation, explaining the basis for the decision not to bring suit. While a substantial percentage of the listed claims have little legal merit and are not likely to be litigated by the United States, there is still a danger that otherwise meritorious title claims will have to be rejected on the ground that the government could be required to pay for the value of the trespassers' improvements.

The Secretary's decision in such matters will no doubt be challenged by some Indian claimants in litigation. Other Indian claimants may choose to file their own actions against the trespassers, seeking to quiet title in the United States for their benefit. The defendants may in turn seek to implead the United States to require that the government pay for the value of their improvements in the event the Indian claimants prevail. In the past, the United States has been successful in resisting such third-party complaints on the ground of sovereign immunity, but that defense has now been rejected by the court of appeals in the case of counterclaims. Because the courts have often held that Indian litigants stand in the shoes of their trustee, the United States (*e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 474-475 (1976)), they may extend the Eighth Circuit's rationale to third-party complaints as well.

Another likely adverse result of the Eighth Circuit's ruling is that when the government sues to

regain possession of improved Indian land from trespassers, it will be compelled to seek mesne profits or trespass damages to offset a possible counterclaim for the value of improvements. In the past, the government has often declined to seek such monetary relief because it seemed inequitable; the instant case is one example of this policy. But the court of appeals' decision will likely force the United States to assert all possible claims in order to protect the public fisc to the maximum extent possible. It seems unlikely that such a change in policy would be in the best interests of any party to Indian title litigation.

In sum, the court of appeals' decision is wrong as a matter of law, and it could adversely affect literally thousands of Indian claims that Congress has directed the Secretary of the Interior to evaluate for litigation. Review by this Court is therefore appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-2350, 81-2351 and 81-2384

No. 81-2350

UNITED STATES OF AMERICA, APPELLEE

v.

ROY TIBBALS WILSON, ET AL.,
STATE OF IOWA, APPELLANT

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL., STATE OF IOWA and
IOWA STATE CONSERVATION COMMISSION,
APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL.,
STATE OF IOWA and IOWA STATE CONSERVATION
COMMISSION, APPELLANTS.

No. 81-2351

UNITED STATES OF AMERICA, APPELLEE

v.

ROY TIBBALS WILSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL
INVESTMENT COMPANY, ET AL.

No. 81-2384

UNITED STATES OF AMERICA, APPELLEE

v.

ROY TIBBALS WILSON, ET AL.,
RGP, INC. and OTIS PETERSON, APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL.,
OTIS PETERSON, APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL.,
RGP, INC. and OTIS PETERSON, APPELLANTS

Appeal from the United States District Court
for the Northern District of Iowa

Submitted: May 18, 1982

Filed: October 26, 1982

BEFORE LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

The present controversy grows out of the overall litigation affecting ownership of 2900 acres of land contiguous to the Missouri River formerly occupied by the Omaha Indian Tribe (Tribe) as part of the Omaha Indian Reservation. The land is within an area called the Barrett Survey; it was reserved by the Tribe according to the terms of an 1854 Treaty whereby the Tribe ceded its lands west of the Missouri River to the United States. Treaty of March 16, 1854, art. 1, 10 Stat. 1043. The eastern boundary of the Reservation was the Missouri River. Commencing in 1879 the course of the erratic and uncontrolled river began changing in the Barrett Survey area, giving rise to this boundary dispute. The detailed facts of the dispute are fully set out in our earlier decisions. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) (hereinafter referred to as *Omaha*

I), *vacated and remanded*, 442 U.S. 653 (1979), and *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir.) (hereinafter referred to as *Omaha II*), *cert. denied*, 449 U.S. 825 (1980).

In *Omaha II*, we ordered title quieted in the Tribe and the United States as trustee for the Tribe to approximately 2200 of the 2900 acres involved in the controversy. The 2200 acres constituted reservation land held in trust by the United States, and claimed by individual landowners. Central to our holding was the applicability of 25 U.S.C. § 194,[1] which operated to shift the burden of proof from the Tribe and the United States to the individual landowners with respect to the trust lands. Left undecided in both *Omaha I* and *Omaha II* were the Tribe's claims to nontrust lands in the possession of the individual landowners until 1975 and to lands in the possession of the State of Iowa until 1975.

The State of Iowa acquired the land now in controversy by quitclaim deeds and by its sovereign ownership of islands and abandoned river channels. In *Omaha II*, following the earlier mandate of the United States Supreme Court, we remanded the claim regarding the State of Iowa's land because section 194 was deemed inapplicable to a sovereign state. 614 F.2d at 1161. The remainder of the land in controversy was patented in fee by the United States prior to 1940 and thus was not part of the trust lands. In

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[1] 25 U.S.C. § 194 reads:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Omaha I we noted the United States government had excepted from its complaint any claim to some 400 acres within the Barrett Survey that may have been allotted to individual Indians and subsequently patented to non-Indians. The Tribe's claim to this land was remanded to the district court at that time. 575 F.2d at 651 n.70.

In the district court's latest ruling,[2] title to the entire 2900 acres was quieted in the Omaha Indian Tribe and the United States as trustee for the Tribe. Appeal from this judgment has been taken by the State of Iowa and individual landowners asserting claims to some 700 acres of the land. The basic dispute on this appeal is the meaning of the Supreme Court's opinion as well as this court's earlier remands and directions.

In review of *Omaha I* the Supreme Court found that this court's application of section 194, which placed the burden of proof on the landowners rather than on the Tribe, was correct. On this basis in *Omaha I* and *Omaha II* we found under applicable federal law that the landowners failed to meet their burden of proof that the Missouri River movements at the critical times in issue had produced accretive lands to the Iowa bank of the Missouri River. We held the evidence of the landowners was speculative and conjectural regarding whether the river movement between 1879 and 1923 had changed by avulsive movements or by slow and imperceptible deposits of accretion to the Iowa bank as claimed by the landowners. On the basis of our initial conclusion that the Tribe had established legal title to the trust lands

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[2] *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981).

prior to the movements of the river in question, and had therefore established presumptive title under section 194, *Omaha I*, 575 F.2d at 631, we directed that title be quieted in the Tribe and the United States as trustee for the Tribe when the landowners failed to carry their burden of proof.

On remand of the Tribe's claims to the fee-patent lands and the State of Iowa's lands, the district court held that title to the entire 2900 acres, including the fee-patent lands and those claimed by the state, should be quieted in the Tribe and the United States as trustee. The district court, albeit reluctantly,[3] reasoned the "law of the case" (*Omaha II*) required quieting title to the trust land in the Tribe; that subsequent to 1923 the river completely eroded and washed away all the fee-patent lands and State of Iowa lands, and that thereafter, when the river moved west again new land accreted to the trust land quieted in the Tribe in *Omaha II*; and further that the Tribe had proven the "new" land claimed by the State and the individual landowners had accreted to the Tribe's reservation land. The court reasoned that adverse possession and statutes of limitations were not valid affirmative defenses against the Tribe and the United States as trustee.

I. *Tribe's Claim to State of Iowa Lands.*

Of the various issues raised on this appeal, we need focus only on the question of the burden of proof and the meaning of *Omaha II*. In the typical quiet title action, where a protective statute such as section 194

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[3] The district court, feeling the result inequitable, invited further constitutional attack on section 194. *Cf. Omaha I*, 575 F.2d at 631 n.18 (noting that constitutional attack is answered by *Morton* v. *Mancari*, 417 U.S. 535, 554-55 (1974)).

is not operative, the burden of proof is on the claimant, which here is the Tribe. The Supreme Court specifically ruled that the State as a sovereign was not affected by section 194 and that as to the original claim made by the Tribe, affecting state lands, the burden of proof remained on the Tribe.[4]

The fundamental question relates to the scope of that burden of proof. We have previously stated that the party bearing the burden of proof had the task of showing "whether the thalweg moved by accretion or avulsion in the critical time periods involved," *Omaha I*, 575 F.2d at 650; *see Omaha II*, 614 F.2d at 1156, 1161, and that the critical time periods were from 1879 to 1923, and post-1923. Here the Tribe claims land in the western portion of the Barrett Survey area. Plate I taken from the Tribe's brief depicts the areas in controversy.[5]

The district court in applying the law of *Omaha II* found that this court determined that the Tribe was the rightful owner of 2200 acres of the former reservation land. We did so, however, solely by reason that the landowners failed to carry their burden of proof. On this basis, we ruled that as against the individual defendants seeking to retain the trust lands under section 194 presumptive title remained in the Tribe.

It is tempting to follow the district court's line of reasoning and assume that these western lands accreted to the trust land and thus belong to the Tribe.

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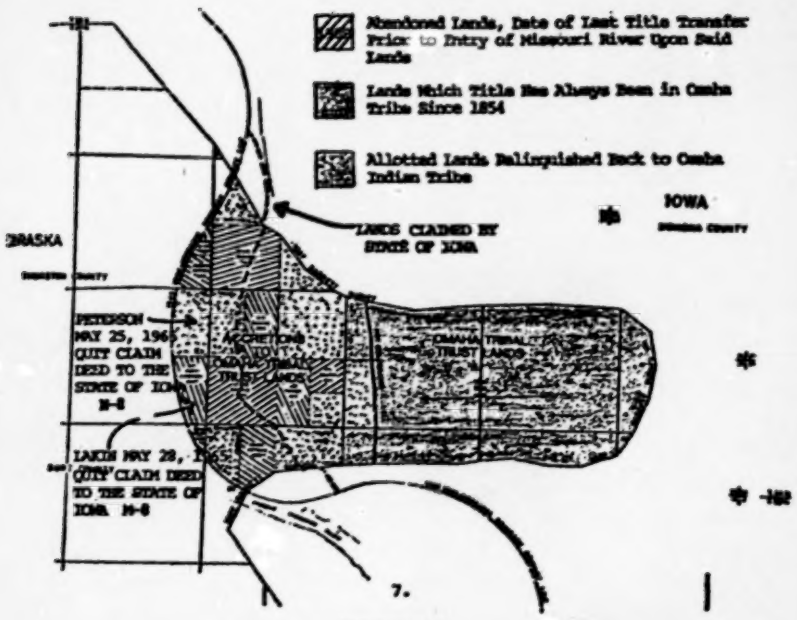
[4] Contrary to the government's suggestion, this court, as well as the Supreme Court, clearly held that section 194 placed the burden of *persuasion* on the landowners to show their title by reason of accretion to the Iowa bank.

[5] The legend is that of Tribe's counsel and is not intended to reflect the court's ruling.

PLATE I



However, we find that reasoning misleading because it allows the Tribe to bootstrap section 194 in asserting its claim against the state.

Our holding in *Omaha II* established the law of the case only between the litigants involved, to wit, the private landowners and the Tribe. Our holding could have no effect on the ongoing and simultaneous dispute between the State of Iowa and the Tribe because the Supreme Court held that the State was not a white person within the meaning of section 194. The State has from the commencement of the litigation denied the Tribe's assertive ownership to the entire land area within the Barrett Survey. Under the Supreme Court mandate, it is clear that for the Tribe to be successful against the State the entire controversy must

be viewed as if section 194 had never been passed.[6] Thus, with regard to State lands the Tribe has the burden of proof to show that the earlier river movements between 1879 and 1923 were avulsive changes, thus establishing no change of title in trust lands.

That we contemplated this burden of proof in *Omaha II* is indicated by the following passage, which we now realize was less than clearly stated:

> The record is not clear as to the time period and as to the specific land involved, in the Tribe's claim that land allegedly owned by the State was cut away from the reservation by avulsion. Under the circumstances, we feel the Tribe's case against the State should be separately remanded, and an opportunity given to . . . point out specific evidence relied upon to show avulsion on the particular land claimed by the State.

614 F.2d at 1161 (footnote omitted).

On the basis of the above reasoning, we again remand to the district court the question of ownership of the land claimed both by the Tribe and by the State. The district court must evaluate the record as to the Tribe's claim to the land previously possessed by the State by placing the burden of proof on the Tribe to establish that the critical westward river movements from 1879 to 1923 were avulsive.[7]

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[6] Our original holding against all the landowners, including the State of Iowa, was premised on the fact that both the State and the private landowners had failed to carry their burden of proof under section 194. This was error, since, as the Supreme Court ruled, section 194 does not apply to the Tribe's claim against the State.

[7] Although we indicated the landowners' proof was speculative whether the river moved by avulsion or accretion in

II. *Fee-Patented Lands.*

We now discuss the claim of the other landowners who, prior to the district court's issuance of the preliminary injunction, asserted title by adverse possession to lands once within the reservation, but divested by the United States and the Tribe before the river movement began in 1879.[8]

The district court found that the landowners cannot claim this land under the guise that it is fee-patented land. The court found the fee-patented land was completely washed away by the post-1923 westward movement of the river. We deem this fact not

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both *Omaha I* and *Omaha II*, we did not assess the evidence in terms of whether the Tribe carried its burden of proof that there was avulsive movement to sustain the claim of the Tribe. This was not the issue. We acknowledge the district court originally held that the Tribe did not carry its overall burden that the river movements were by avulsion. We vacated that ruling because it erred in making the proper assessment of where the burden actually lay.

For the Tribe to be successful against the State, it must show the land east of the nonobliterated line (*see* Plate I) belongs to the Tribe by reason of the Tribe carrying its burden of proof that the river movements were by avulsion. This court's ruling that title was quieted in the Tribe affected only the claim to the trust lands east of the nonobliterated line. Insofar as the State's lands are involved in the same litigation our holding did not affect the State of Iowa.

[8] The record is not clear as to which lands within the disputed 700 acres were divested by the Indian Tribe and the government and which were not. The Tribe contends some of the area was allotted land relinquished back to the Tribe. *See* Plate I. Assuming the Tribe can establish that land was relinquished back to the Tribe, if the land is not otherwise claimed by the State of Iowa, title to such relinquished land should be quieted in the Tribe, as trust land, as we ruled in *Omaha II*.

significant. It is the *area of land* now occupied by the landowners that is important. *See Wilson v. Omaha Indian Tribe*, 442 U.S. at 668. This area of land is the same location where allotted lands existed because the Tribe and the United States divested the land from the reservation. Thus, the real significance is that this 400 acre area now claimed by the landowners, acknowledged to involve a separate claim in *Omaha I*, 575 F.2d at 651 n.70, is not trust land. It is not land in which the Tribe can claim that it is entitled to presumptive title by reason of section 194. Thus, as in the controversy involving the State, we deem it important that the Tribe must carry its burden of proof of rightful ownership as to this land. Because section 194 is not applicable to these 400 acres, it is clear that the burden of proof does not rest on the landowners.

The district court reasons, however, that because our mandate in *Omaha II* ordered it to quiet title to the 2200 acres in the Tribe, the law of the case is that the Tribe owned the trust land, and because it is undisputed that the 400 acres of fee-patented land accreted to the trust land by the post-1923 river movement, the Tribe is entitled to judgment. We find this reasoning is in error. The law of the case (*Omaha I* and *Omaha II*) is that the landowners failed to sustain the burden of proof placed on them pursuant to section 194, and therefore, as to the trust land, the Tribe was awarded presumptive title against those landowners. We did not hold that the Tribe established that the original boundary to the reservation remained unchanged by reason of avulsive river movements from 1879 to 1923, thereby establishing continuing ownership of the Tribe in the trust land. We deem such proof essential for the Tribe and the United

States as trustee to establish their claim to the non-trust lands.[9]

The State and the private landowners have never disputed that the land west of the nonobliterated line (Plate I) was accretion land that attached to land to the east. Their contention has been that most of this land accreted to the Iowa bank since the reservation lands had been completely eroded away. Both the State of Iowa and the individual owners contend that the Tribe, to meet its burden of proof regarding the tracts of land now in controversy, must prove that the river moved westward over the eastern Barrett Survey land between 1867 and 1923 by avulsion; in other words, they argue the Tribe must establish affirmatively how the river moved during the entire period of time relevant to this lawsuit. As indicated, we agree.

This court's *Omaha II* decision established only that the private defendants had failed to meet their burden of proving how the river moved in the critical time periods. This court recognized that the necessary result of our decision that the landowners had failed to meet their burden was that when the district court entered final judgment, it would ultimately be required, by reason of section 194, to enter a decree quieting title to the trust land in the Tribe and the United States as trustee for the Tribe.[10]

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[9] It is appropriate to mention here the off-quoted [sic] maxim that "in an action to quiet title the plaintiffs must rely upon the strength of their own title and not upon the weakness of that of the defendants." *Dudley* v. *Meyers*, 422 F.2d 1389, 1394-95 (3d Cir. 1970); *see also Rasmussen Drilling, Inc.* v. *Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1158 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

[10] The district court did not enter a judgment quieting title to the trust lands claimed by the private defendants in the

However, this court's finding that the landowners failed to meet their burden of proof, and our recognition of the effect of that finding, did not establish that the Tribe had or would have carried the burden of proof showing that the original trust boundaries had not been altered. The latter holding would be an essential predicate for the Tribe to prove its claim to nontrust lands.

As we have discussed earlier, in regard to the lands claimed by the State, to hold otherwise would in effect give the Tribe the benefit of section 194 with respect to its claims to the State lands and the fee-patented lands, rather than only with respect to its claims to trust lands held by the private defendants. This result would clearly be unsupportable, and was not intended by our mandate in *Omaha II*. The Tribe cannot do indirectly what it cannot do directly.

We therefore remand this case to allow the district court to determine whether the Tribe has met its burden of proof as defined herein. If it holds that the Tribe failed to meet its burden, it must then determine whether the private defendants and the State of Iowa are entitled to have title to the tracts of land in controversy quieted in them.[11]

Tribe and the United States until it entered a final judgment disposing of all claims of all parties to lands within the original Barrett Survey.

[11] Defendants also appeal the district court's denial of their request for the value of improvements they made to Barrett Survey land during their possession of it. It is our understanding that the improvements were made solely on the particular tracts of land in controversy here, and not on the trust lands with respect to which this court has already indicated title must be quieted in the Tribe and the United States. If we are correct, then clearly we need not rule on this issue in view of our remand.

We recognize that requiring the Tribe to prove its underlying entitlement to the eastern trust lands to establish its right to the western portion of the Barrett Survey area may seem anomalous in view of *Omaha II*, in which this court has already concluded that title must be quieted in the Tribe to the eastern trust lands. This result is reached, however, as we pointed out above, because of the partial application of section 194 to this case. To hold otherwise would allow the Tribe to apply section 194 against the owners of the land held in fee and against the State of Iowa and would be inconsistent with our earlier mandate.

We also recognize that, because of the passage of time involved, the party having the burden of proof inevitably may face unsuperable barriers, and if the district court finds this to be so, the end result will be that the Tribe will prevail only as to the trust lands formerly in the possession of the private defendants, but not as to the remainder.

The judgment of the district court is reversed and the cause remanded for proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1982

Filed: October 26, 1982

No. 81-2350

UNITED STATES, APPELLEE

vs.

ROY TIBBALS WILSON, ET AL.,
STATE OF IOWA, APPELLANT

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL.,
STATE OF IOWA, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT, ET AL.,
STATE OF IOWA, ET AL., APPELLANTS

No. 81-2351

UNITED STATES OF AMERICA, APPELLEE

vs.

ROY TIBBALS WILSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT COMPANY, ET AL.

No. 81-2384

UNITED STATES OF AMERICA, APPELLEE

vs.

ROY TIBBALS WILSON, ET AL.,
RPG, INC., ET AL., APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL.,
OTIS PETERSON, APPELLANT

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL.,
RGP, INC., ET AL., APPELLANTS

JUDGMENT

These appeals from the United States District Court for the Northern District of Iowa were considered on a designated record from the United States District Court and on briefs of the respective parties and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in these causes be, and the same is hereby, reversed and remanded to the said District Court for proceedings consistent with the opinion of this Court.

October 26, 1982

A true copy:

Attest:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 81-2350, 81-2351 and 81-2384

No. 81-2350

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, deceased, STATE OF IOWA, APPELLANT

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL., STATE OF IOWA and IOWA STATE CONSERVATION COMMISSION, APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL., STATE OF IOWA and IOWA STATE CONSERVATION COMMISSION, APPELLANTS

No. 81-2351

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, deceased, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, ET AL.

No. 81-2384

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, deceased, ET AL., RGP, INC. and OTIS PETERSON, APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

v.

HAROLD JACKSON, ET AL., OTIS PETERSON, APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL., RGP, INC. and OTIS PETERSON, APPELLANTS

Appeals from the United States District Court
for the Northern District of Iowa

Upon Petition for Rehearing

Submitted: May 18, 1982

Filed: June 10, 1983

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

Per Curiam.

Both sides have filed petitions for rehearing. Upon full consideration of the petitions and supplemental briefs, we adhere to our original opinion but delete footnote 11. We remand the case to the district court for further proceedings consistent with our modified opinion.

In their briefs on appeal, the landowners had urged that the district court erred in refusing to require the United States to reimburse them for the

value of improvements made upon land within the Barrett Survey area during the time for the landowners' possession. In footnote 11, we stated:

> It is our understanding that the improvements were made solely on the particular tracts of land in controversy here, and not on the trust lands with respect to which this court has already indicated title must be quieted in the Tribe and the United States. If we are correct, then clearly we need not rule on this issue in view of our remand.

In their petitions for rehearing, the landowners informed the court that improvements had been made on both trust and non-trust lands. Therefore, we will consider the improvements issue.

The landowners claimed in the district court that the obligation of the United States to reimburse them for the value of improvements was a condition precedent to its right to have title quieted. The district court rejected the landowners' argument, characterizing their claim as a counterclaim barred by the sovereign immunity of the United States. *See United States* v. *Wilson*, 523 F. Supp. 874, 900-902 (W.D. Ia. 1981).

In a quiet title action where the plaintiff seeks the equitable remedy of a decree quieting title in himself, it is generally accepted that the plaintiff must do equity by reimbursing the defendant for the value of improvements as a condition precedent to his right to relief. *See, e.g., Goode* v. *Gaines*, 145 U.S. 141, 154-55 (1891) [where owner knew improvements were being constructed and acquiesced to construction]; *McAndrews* v. *Belknap*, 141 F.2d 111, 115 (6th Cir.), *cert. denied*, 323 U.S. 721 (1944); *Pen-*

dergrass v. *Massengill*, 152 S.E.2d 657, (N.C. 1967); *Scott* v. *Nygaard*, 405 P.2d 850, 851 (Or. 1965); *Simpson* v. *Bostwick*, 80 N.W.2d 339, 344 (Iowa 1957).

We see no reason why on the facts of this case the United States should be excused from the application of this equitable doctrine. It is well established that the United States is subject to general principles of equity when seeking an equitable remedy. *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 506 (1927); *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 339 (1906); *United States* v. *Second National Bank of North Miami*, 502 F.2d 535, 548 (5th Cir. 1974); *Sierra Club v. Hickel*, 467 F.2d 1048, 1052 (6th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

We hold, as did the court in *United States* v. *Bedford Associates*, 618 F.2d 904, 920 (2d Cir. 1980), that "when the government invokes the equity powers of the district court, that court has the power to withhold the relief requested unless the government performs the conditions precedent to its claim." This principle is further supported by decisions of the Fourth, Fifth and Ninth Circuits. *See United States* v. *Desert Gold Mining Co.*, 448 F.2d 1230, 1231 (9th Cir. 1971); *Ehrlich* v. *United States*, 252 F.2d 772, 776 (5th Cir. 1958); *Lacy* v. *United States*, 216 F.2d 223, 225 (5th Cir. 1954); *Jacobs* v. *United States*, 239 F.2d 459, 461-62 (4th Cir. 1956), *cert. denied*, 353 U.S. 904 (1957); *Martin* v. *United States*, 240 F.2d 326 (4th Cir. 1957), *on remand*, 162 F. Supp. 932 (M.D. N.C. 1958) *aff'd in part, rev'd in part*, 270 F.2d 65 (4th Cir. 1959).

Because the duty to pay for the value of improvements is an element of the government's own claim, a

condition precedent to the right of the United States to recover, we find the doctrine of sovereign immunity is inapplicable. The duty of the United States to pay for the value of improvements, upon a proper showing of entitlement by the landowners, does not arise as a result of finding adverse to it on a counterclaim by the defendants.

We therefore hold that the district court erred in characterizing the landowner's claim as a counterclaim barred by the doctrine of sovereign immunity, and remand for the district court to determine whether, under the applicable principles of law, the United States should be ordered to reimburse the landowners for the value of improvements and if so, in what amounts.[1]

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[1] It is "well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." *Hendershott* v. *Shipman*, 231 P.2d 481, 483 (Cal. 1951). *Cf. Bjornstad* v. *Fish*, 87 N.W.2d 1, 8 (Ia. 1957). The United States has heretofore made no claim for recovery of rents and profits. However, the Tribe brought an action for ejectment and for trespass damages, which was severed. We urge the parties and the district court to consider consolidation of all remaining claims arising out of the possession or lack of possession of the Barrett Survey area during the period in controversy, so that the claims may be resolved in the most judicially efficient manner.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 81-2350

UNITED STATES, APPELLEE

vs.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, Deceased, APPELLANT
STATE OF IOWA

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL.
STATE OF IOWA and
IOWA STATE CONSERVATION COMMISSION,
APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL.,
STATE OF IOWA and
IOWA STATE CONSERVATION COMMISSION,
APPELLANTS

No. 81-2351

UNITED STATES OF AMERICA, APPELLEE

vs.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, deceased, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL., APPELLANTS

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY, ET AL.

No. 81-2384

UNITED STATES OF AMERICA, APPELLEE

vs.

JOHN R. WILSON, Personal Representative of the Estate of Roy T. Wilson, deceased, ET AL., RGP, INC. and OTIS PETERSON, APPELLANTS

OMAHA INDIAN TRIBE, ETC., APPELLEE

vs.

HAROLD JACKSON, ET AL., OTIS PETERSON, APPELLANT

OMAHA INDIAN TRIBE, APPELLEE

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., ET AL., RGP, INC. and OTIS PETERSON, APPELLANTS

[Filed Jun. 10, 1983]

These appeals from the United States District Court for the Northern District of Iowa were considered on a designated record from the United States District Court and on briefs of the respective parties and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in these causes be, and the same is hereby, reversed and remanded to the said District Court for proceedings consistent with the opinion of this Court as modified

June 10, 1983

[SEAL]

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

Nos. 81-2350/2351/2384

UNITED STATES OF AMERICA, ET AL., APPELLEES

vs.

JOHN R. WILSON, ETC., ET AL., APPELLANTS

Appeal from the United States District Court
for the Northern District of Iowa

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge Ross took no part in the consideration of the petition for rehearing en banc.

August 11, 1983

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4024

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROY TIBBALS WILSON, ET AL., DEFENDANTS

C 75-4026

OMAHA INDIAN TRIBE, ETC., PLAINTIFFS

vs.

HAROLD JACKSON, ET AL., DEFENDANTS

C 75-4067

OMAHA INDIAN TRIBE, PLAINTIFF

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT COMPANY, ET AL., DEFENDANTS

ORDER

In accordance with the Memorandum Opinion filed this date in the above-entitled cases, it is hereby

ORDERED, ADJUDGED and DECREED:

(1) Each and every one of this Court's Findings of Fact and Conclusions of Law are by this reference made a part hereof.

(2) Pursuant to the mandate of the Eighth Circuit Court of Appeals, and the Findings and Conclusions filed by this Court, judgment will be entered in favor of the Plaintiffs, Omaha Indian Tribe and United States of America, as Trustee, quieting title in them to the Barrett Survey land in controversy in these cases claimed by them as against the Defendants, RGP, Inc., Roy Tibbals Wilson, Charles E. Larkin, State of Iowa, Harold M. Sorenson, and Travelers Insurance Company, in respect to their several claims.

(3) Defendants motions for summary judgment are denied. Additionally, Defendants' prayers for equitable relief by their claim for the value of improvements on Barrett Survey land are denied.

Dated this 8th day of September, 1981.

BY THE COURT:

/s/ Andrew W. Bogue
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

September 4, 1981

Chambers of
ANDREW W. BOGUE
Chief Judge

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MEMORANDUM OPINION

Gentlemen and Ms. Osenbaugh:

The Eighth Circuit Court of Appeals remanded these cases to this Court to determine the facts in light of the principles and conclusions set forth in both its second opinion, *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir. 1980), and in the opinion of the United States Supreme Court. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 99 S.Ct. 2529 (1979). This Memorandum Opinion provides this Court's resolution of several issues of law and fact remaining in the consolidated Blackbird Bend-Barrett Survey area cases.

I. FACTUAL BACKGROUND

These cases concern the ownership of approximately 2,900 acres of land on the east bank of the Missouri River in Iowa. The parties seek to quiet title to the land, which was affected by the movement of the banks of the Missouri River over a period of nearly eighty years. The history of this land dispute and the discussion of the early movement of the Missouri River is set out in the Court's original opinion, 433 F.Supp. 67 (N.D. Iowa 1977), as well as the two opinions of the Court of Appeals. 575 F.2d 620 (8th Cir. 1978); 614 F.2d 1153. The Court of Appeals vacated this Court's original judgment and remanded the case with several directions. First, the Court entered judgment quieting title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee and the Omaha Indian Tribe. Second, the Appellate Court ordered that the Tribe's case against the State be severed, so that this Court could separately determine

whether the Tribe sustained its burden of proof against the State. 614 F.2d at 1161.

Several additional issues were not resolved by any of the Appellate Court decisions in this case. One issue concerns the ownership of land within the Barrett Survey which was allotted to individual Indians and subsequently patented to non-Indians, or relinquished by the Indian allottees back to the Tribe. The Court of Appeals' second decision concerned only trust lands and failed to respond to issues of ownership of "fee patented" lands. The Court's first decision remanded the issues of fee patented land ownership back to this Court. 575 F.2d at 651, n.70. This Court must further address the defendants' claim for the value of improvements placed upon the land in which title was quieted in plaintiffs. Finally, this Court has before it the parties' motions for summary judgment concerning title to lands outside the Barrett Survey within the Blackbird Bend area.

To better understand the remaining issues and claims of the parties, the Court refers to Exhibit T80. (Plate 1) The area in orange represents land which has never been allotted to any member of the Omaha Tribe and has never been patented by the United States to anyone. These are trust lands claimed only by individual defendants and clearly are governed by the Court of Appeals' order to this Court to quiet title in the United States as trustee and in the Tribe. The area in green on Exhibit T80 represents allotments which have been relinquished by the allottees or cancelled. *See also*, Exhibits A through P.[1] Finally,

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[1] Exhibits A through P are the letters of various allottees or their heirs requesting that their original allotments within the Omaha Indian Reservation be exchanged for new allotments. Because of the encroachment of the Missouri River,

the cross-hatched areas on Exhibit T80 are lands which have been patented in fee or otherwise left their trust status after the 1854 Treaty. The individual defendants assert a claim to the fee patented lands based upon state laws for adverse possession, statutes of limitation and laches.

The Tribe contends that both the individual defendants' claim to fee patented lands and the State of Iowa's claim to land along the western edge of the Barrett Survey, are defeated by the evidence establishing that all of the land in the western Barrett Survey was eroded and replaced by accretions to tribal trust land. The prior decisions in this case place upon the Tribe the burden of proving its case against the State by a clear preponderance of the evidence. 99 S.Ct. at 2543; 614 F.2d at 1161. This Court must address first the State's argument concerning the scope of the Tribe's burden of proof.

II. THE TRIBE'S BURDEN OF PROOF AGAINST THE STATE OF IOWA

The Tribe asserted title to trust lands in the eastern portion of the Barrett meander lobe based on a series of river avulsions between 1867 and 1923, which left these original reservation lands in place. 433 F.Supp. at 70-71. After reaching its 1923 position,[2] however, the Tribe asserted the River moved easterly, eroding the western portion of the Barrett Survey up to a line running north to south through the western edge of Nebraska Sections 13 and 24.[3] From this line east-

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the original allotments had become unsuitable for farming. (Corke-86:12-88:12).

[2] Exhibit T105, (Plate 2).

[3] *See*, Exhibit T80; (Abrahamson—1425:7-19).

ward in the Barrett Survey, the Tribe alleged its lands left in place by pre-1923 river avulsions were not later obliterated. From this line, to the west in the Barrett Survey up to the 1943 Iowa-Nebraska Compact line, the following specific River movements were asserted: (1) From 1923 to 1930, the River eroded all of the Barrett Survey lands lying west of the "not obliterated" line, as the River moved eastward; (2) From 1930 to 1943, the River receded westward to its present location, replacing all of the western Barrett Survey lands with accretions and relictions. These accretions attached to tribal lands in place in the Barrett Survey east of the "not obliterated" line. *See*, Tribe's Post-Trial Proposed Findings of Fact, No. 58; (1446:9-1447:24).

The Tribe owns the trust lands east of the "not obliterated" line by virtue of the Court of Appeals' decision which held that the individual defendants failed to prove their superior title thereto based on pre-1923 river movements. 575 F.2d at 650, 651; 614 F.2d at 1161. The land claimed by the State of Iowa is located along the Compact line in the western portion of the Barrett Survey. *See*, State's Proposed Findings on Remand, No. 41. Consistent with its original theory, therefore, the Tribe asserts title to these lands as accretions created after 1923, which attached to eastern tribal lands.

The State of Iowa, however, contends that the Tribe must affirmatively prove pre-1923 river avulsions as well as movement by accretion thereafter.[4] The State

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[4] This Court is puzzled by the Court of Appeals' statement that the Tribe should "point out specific evidence relied upon to show avulsion on the particular land claimed by the State." 614 F.2d at 1161. A cursory reading of either the Tribe's Post-Trial Proposed Findings or the Record the Tribe de-

asserts it is not bound by the Court of Appeals' decision quieting tribal title to the eastern Barrett Survey lands, since that decision was based upon the failure of other defendants to meet their burden of proof under 25 U.S.C. § 194. That decision "does not establish, in this proceeding in which the [Tribe has] the burden of persuasion, that the river moved to its 1879 and 1923 positions by avulsion. . . ." State's Proposed Conclusions on Remand, No. 10. Given the reallocation of the burden of proof on remand, the State contends there is a "nonidentity of issues." In support of its conclusion that the Tribe must prove pre-1923 avulsions over eastern Barrett Survey lands, the State cites *Young & Co.* v. *Shea*, 397 F.2d 185, 188-189 (5th Cir. 1968); *In re Four Seasons Securities Laws Litigation*, 370 F.Supp. 219, 235 (W.D. Okl. 1974); *Finnerman* v. *McCormick*, 499 F.2d 212, 214 (10th Cir. 1974); *Shimman* v. *Frank*, 625 F.2d 80, 89 (6th Cir. 1980). These cases stand for the rule that a judgment obtained in a prior, distinct proceeding will not resolve common issues of fact in a subsequent case between the same parties, in which the burden of persuasion differs. *See also*, Rest. 2d *Judgments*, § 68.1(d).

Admittedly, this is not a proper case for the invocation of the doctrines of *res judicata* and collateral estoppel. *Res judicata* requires a showing that there has been a previous action between the same parties involving the same subject matter, in which a final judgment has been rendered with respect to the same cause of action. *Parklane Hosiery Co., Inc.* v *Shore*,

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veloped at trial would have revealed that its claim against the State did not rely upon proof of pre-1923 avulsions. This Court does not, therefore, deem that statement controlling on remand.

439 U.S. 322, 99 S.Ct. 645 (1979); *Bryson* v. *Guarantee Reserve Life Ins. Co.*, 520 F.2d 563 (8th Cir. 1975). Clearly, the Tribe does not invoke a judgment obtained in a prior, distinct proceeding. The judgment quieting tribal title in eastern Barrett Survey trust lands was entered on appeal in this action, and it concerned the title to property distinct from the land the State claims.

Further, collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in a future lawsuit. *Harris* v. *Washington*, 404 U.S. 55 (1971); *Oldham* v. *Pritchett*, 599 F.2d 274 (8th Cir. 1979). The issue of ultimate fact determined by the Court of Appeals was title to trust lands claimed by other individual defendants. Title to that land is no longer in issue. This case, on remand, does not concern the power of the Court to decide issues already determined by a prior, distinct proceeding. Neither collateral estoppel, therefore, nor any exception to the doctrine based on reallocations of burden of proof, apply to this stage of the proceeding.

Nonetheless, the State cannot require the Tribe to prove river movements over eastern trust lands the State does not claim, the title to which was quieted in the Tribe against other defendants. The decision of the Court of Appeals did not resolve an issue of fact common to the issues now before this Court. The fact that the burden of proof differed concerning other land and other parties is of no consequence to the Tribe's claim against the State.

It does not matter that the Court of Appeals did not finally determine the nature of the pre-1923 river movements over eastern trust lands. That issue is no

longer relevant. The State does not claim title to any eastern trust lands affected by the pre-1923 river and governed by the Court of Appeals' mandate. Proof of pre-1923 river changes is not essential to the Tribe's claim against the State. The decision of the Court of Appeals quieting tribal title to land lying east of the State's claims, therefore, constitutes the law of this case.

The Eighth Circuit Court of Appeals has repeatedly stated:

> When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this Court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. . . . That Court is without power to do anything which is contrary to either the letter or spirit of the mandate. . . . *Thornton* v. *Carter*, 109 F.2d 316, 319-320 (8th Cir. 1940); *Houghton* v. *McDonnell Douglas Corp.*, 627 F.2d 858, 865 (8th Cir. 1980); *Paull* v. *Archer-Daniels-Midland Co.*, 313 F.2d 612 (8th Cir. 1963.)

To require the Tribe to reassert its evidence of river movements over land which it owns under the Court of Appeals mandate would be contrary to the decree this Court is bound to execute upon remand of this action.

Accordingly, the evidence which is relevant to the Tribe's claim against the State is that which concerns the movement of the river, from 1923-1943, over the land the State claims.

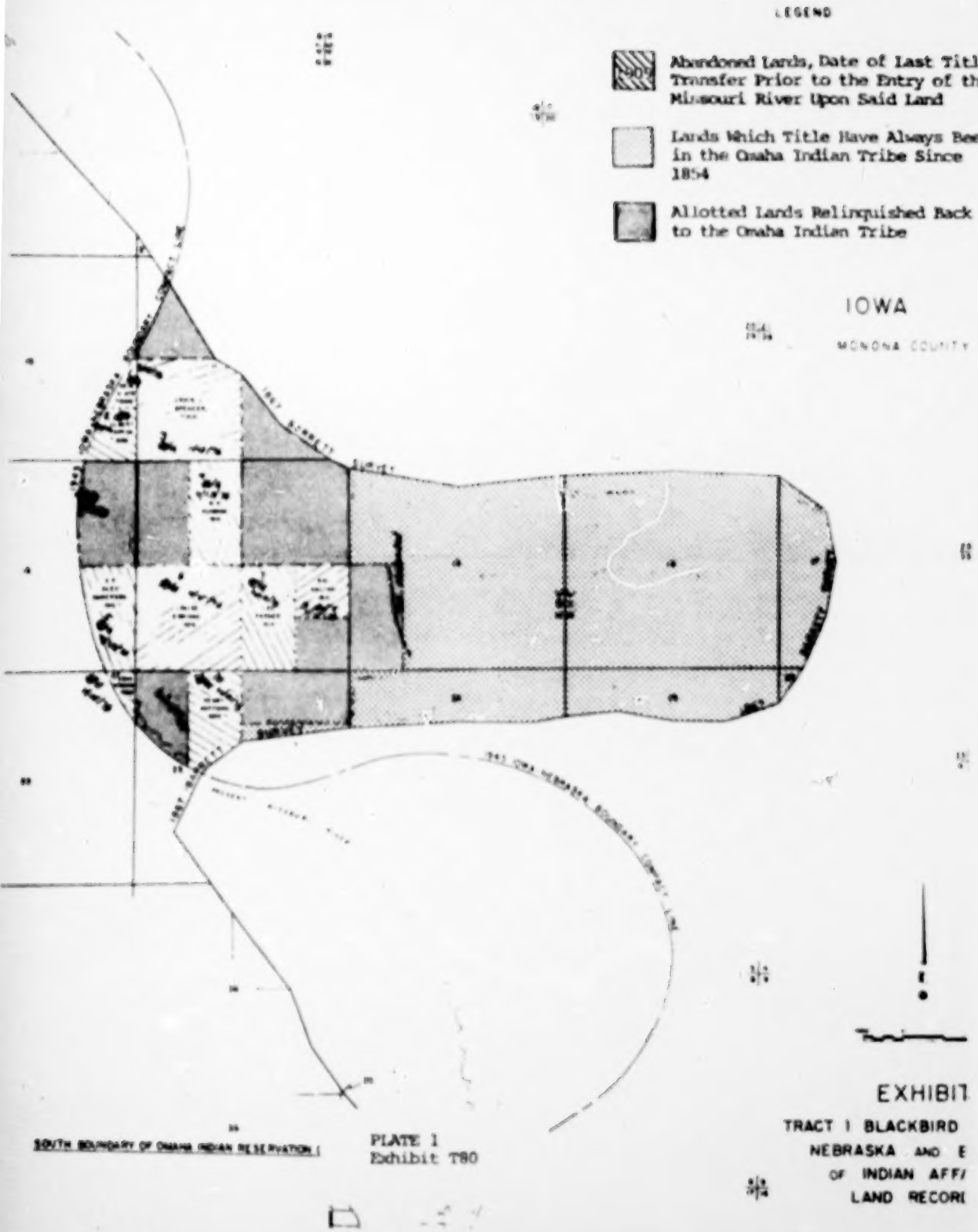


PLATE 1
Exhibit T80

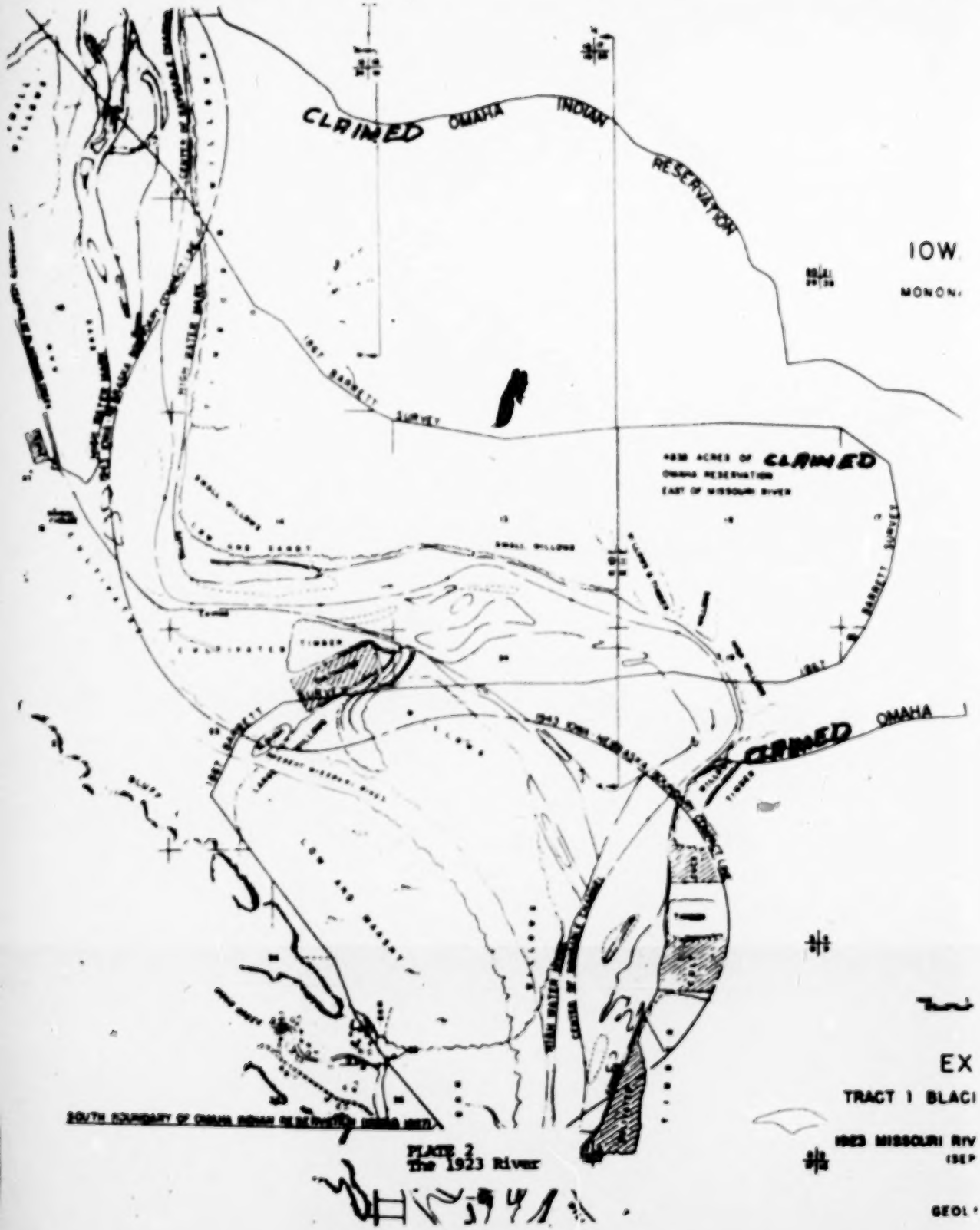
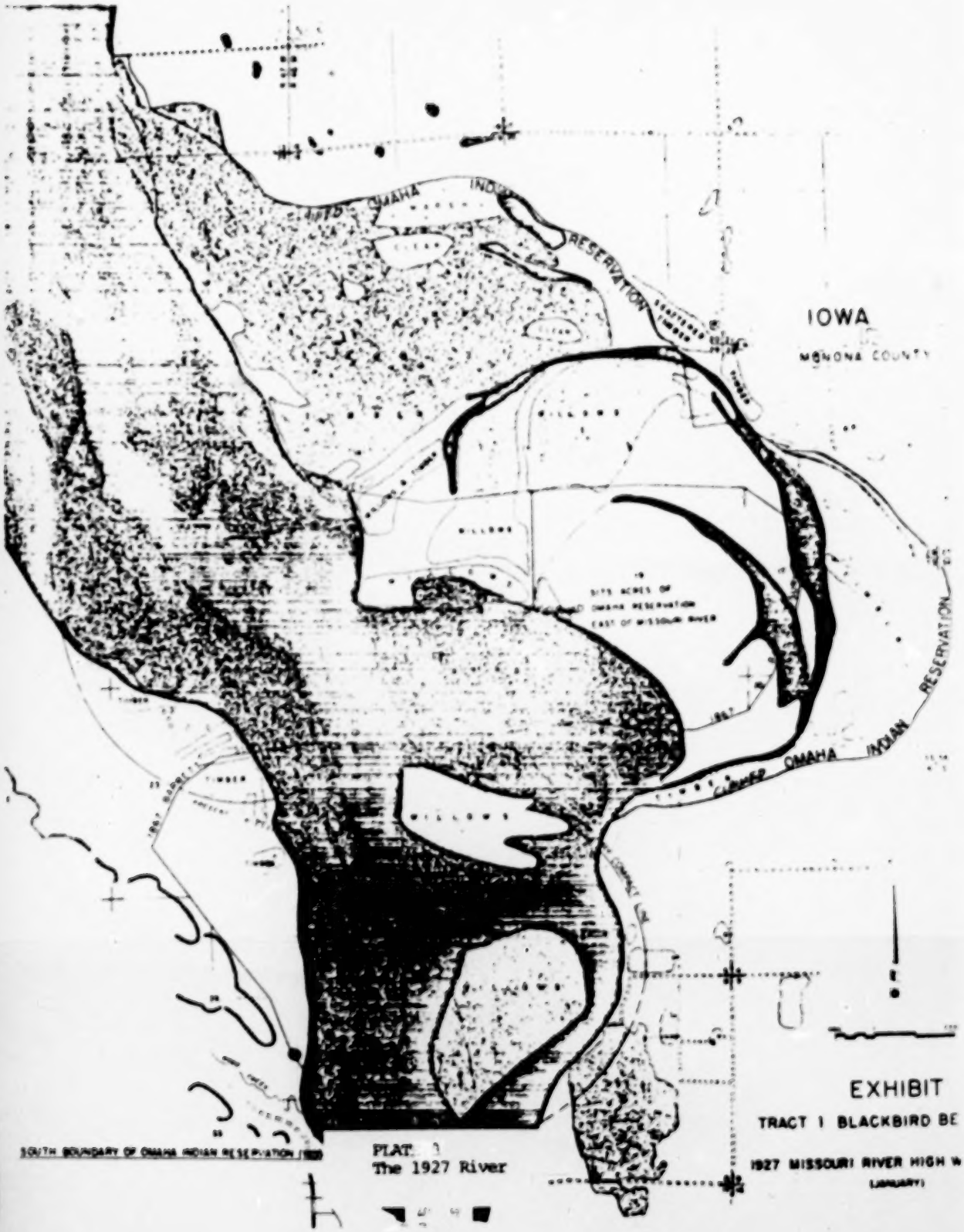


PLATE 2
The 1923 River



PLAT 1
The 1927 River

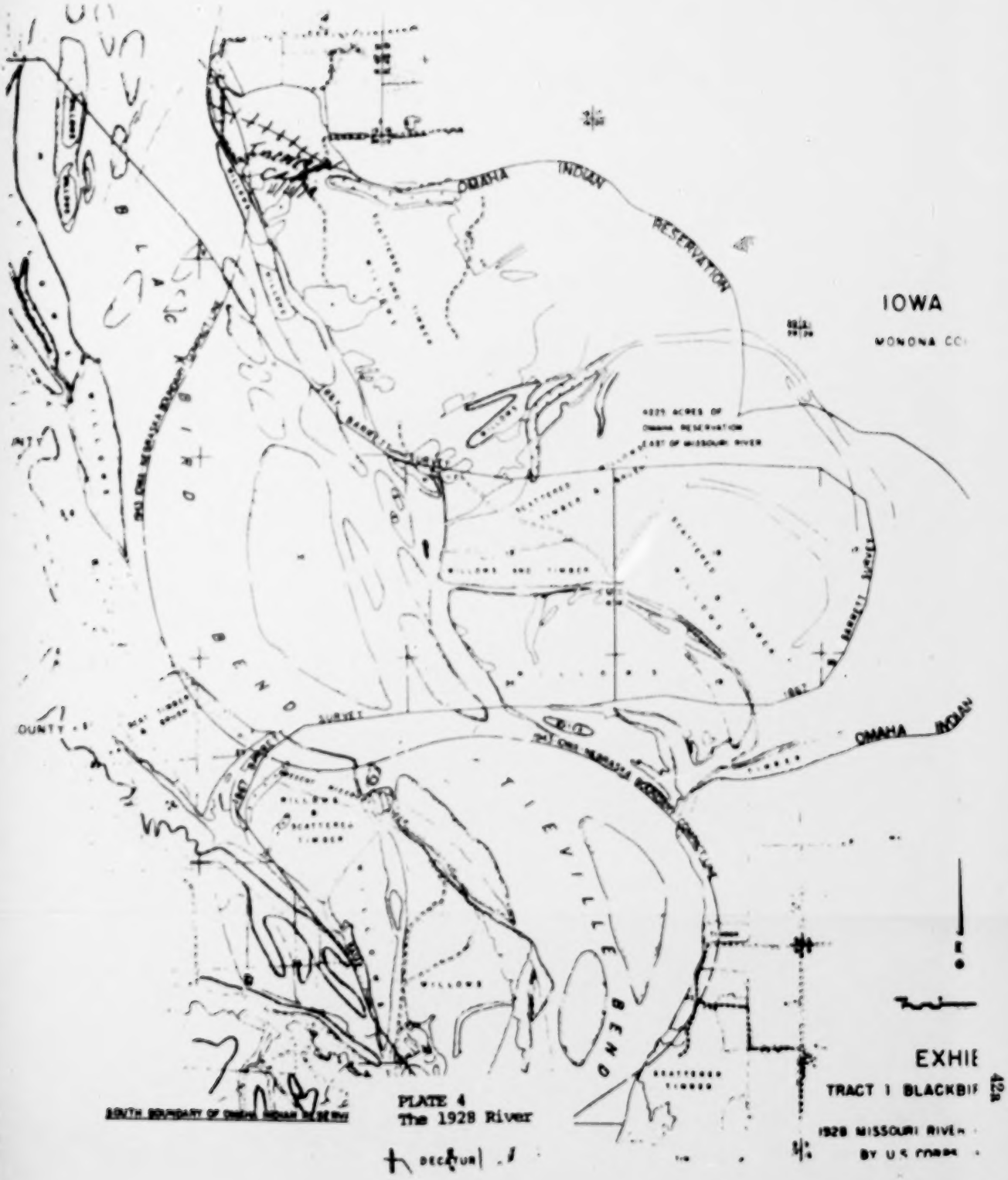


PLATE 4
The 1928 River

SOUTH BOUNDARY OF OMAHA INDIAN RESERVATION

DECATUR

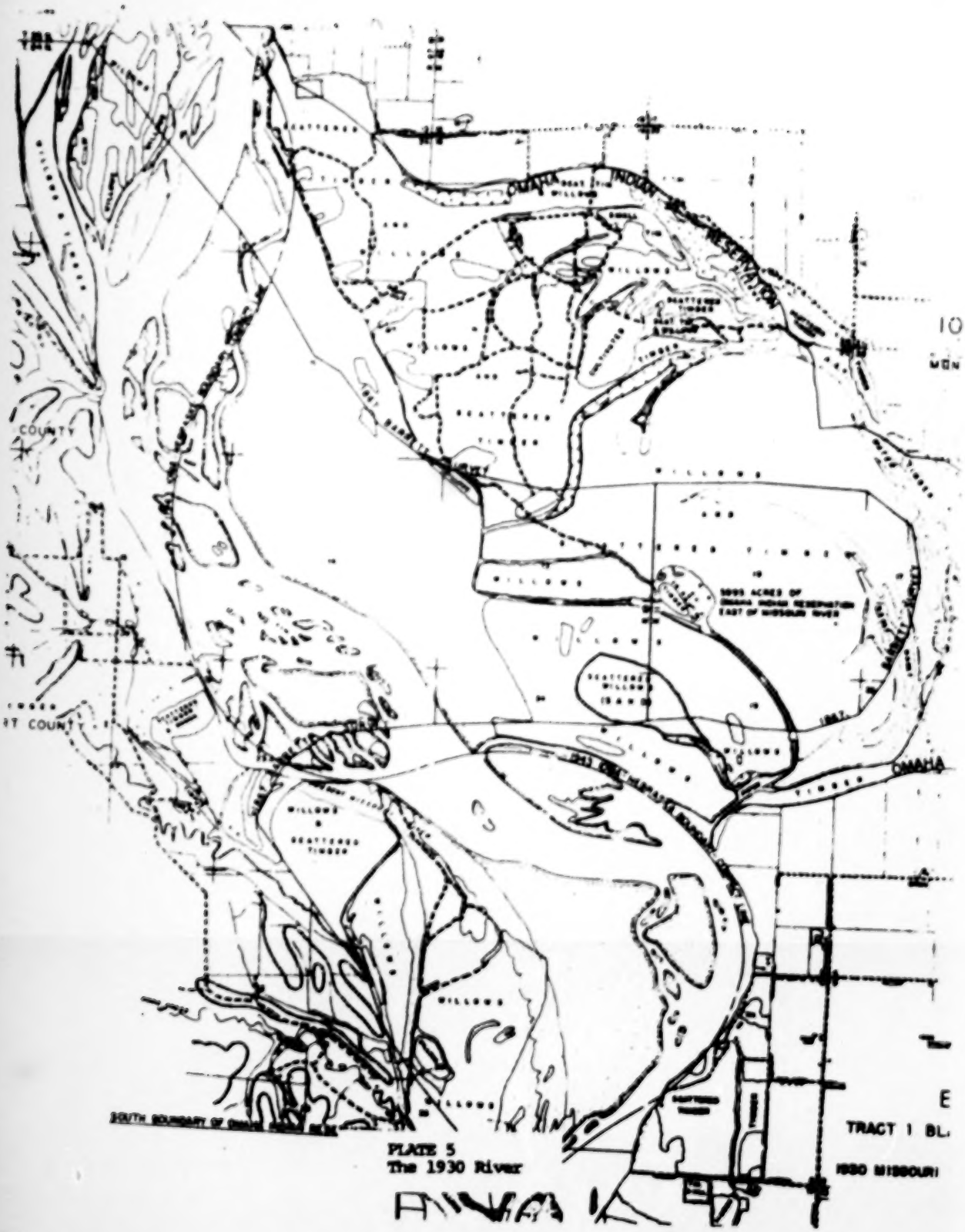


PLATE 5
The 1930 River

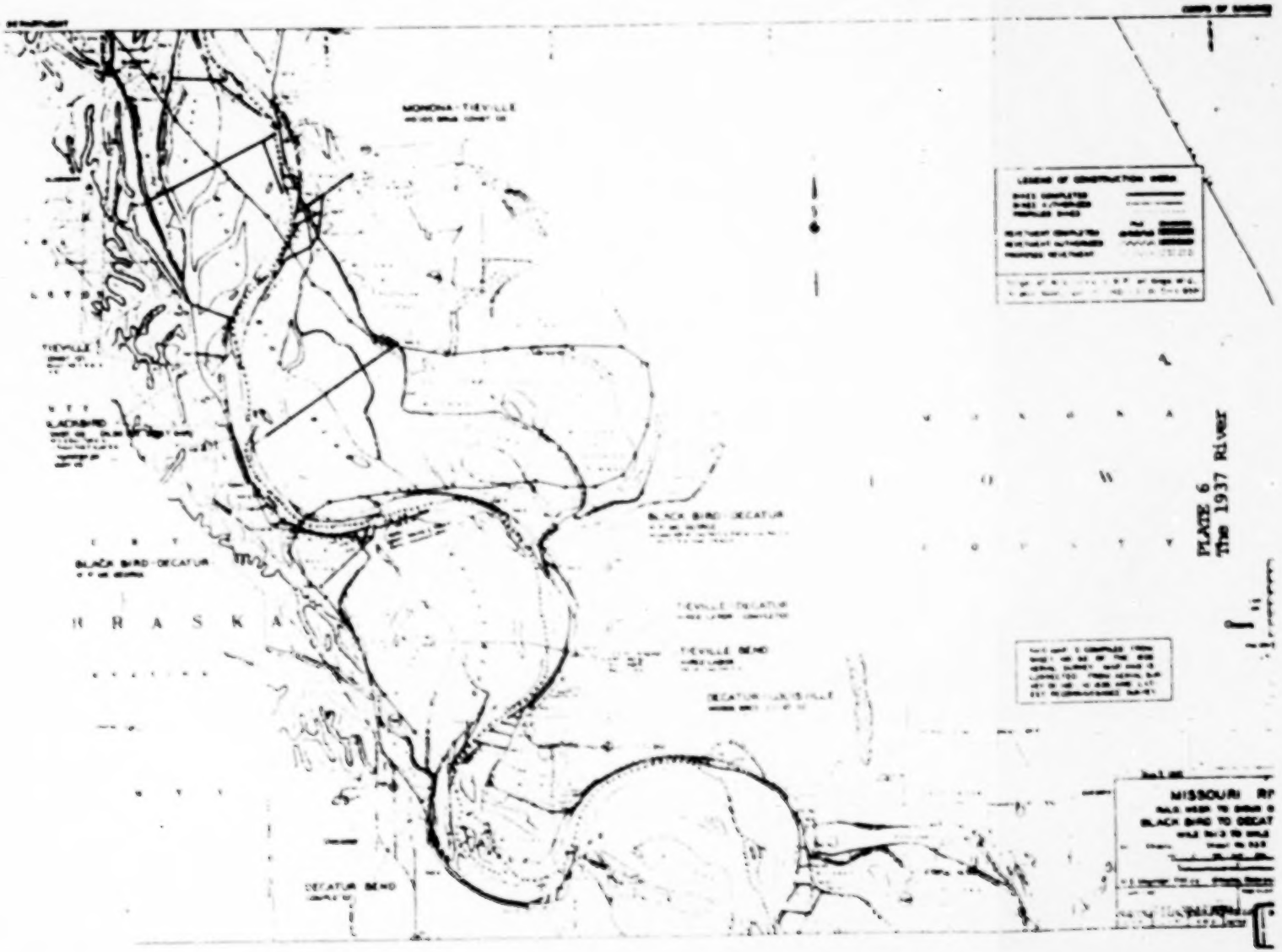


PLATE 6
The 1937 River

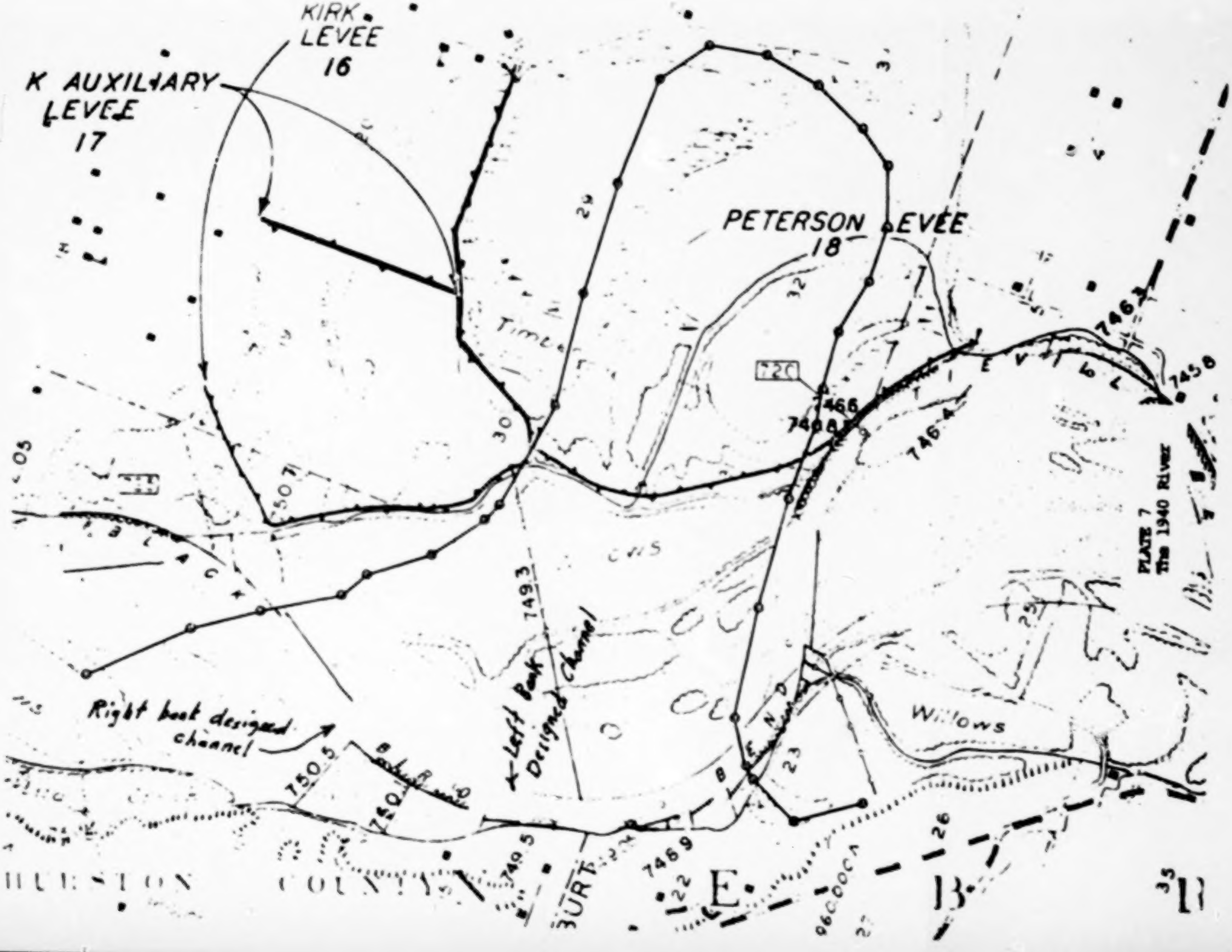


PLATE 7
The 1940 River

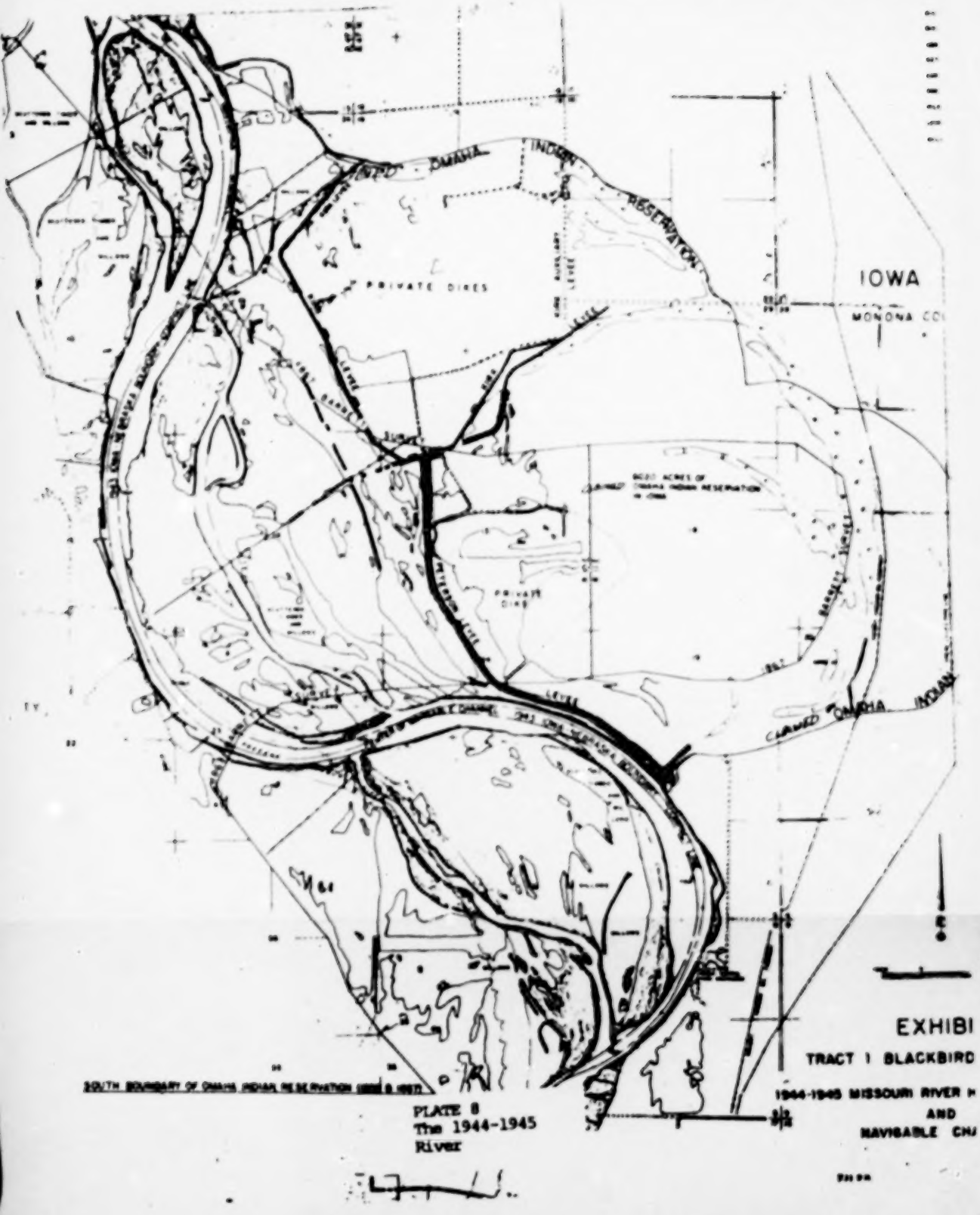


PLATE 8
The 1944-1945
River

1944-1945 MISSOURI RIVER H

III. THE MISSOURI RIVER BETWEEN 1923-1943

A. U.S. Corps of Engineers maps and aerial photographs trace the location of the river during this period. In 1923 (Exhibits W-04; T-35; T-105, composite), the river flowed north to south through Nebraska Sections 10, 11, 14 and 15. (341:8) When it reached the southeast corner of Section 15, the river made a 90 degree angle turn to the east, traversing the southern portion of Sections 14, 13 and 18. The river then turned south and left the Barrett Survey area. The land on the east bank, in Sections 11, 14, 13 and 18, was supporting some vegetation, consisting primarily of small willows.

After 1923, the river became "braided." (1073:12-14) That is, the river flowed in a wide riverbed, with many channels. (1101:23-25) From 1923 to 1927 (Plate 3), the left bank of the river migrated a mile to the east, into Sections 13 and 24. (2084:12) (Exhibits W-54, T-36, T-106, composite) In 1928, the riverbed extended from the western half of Section 15, across Section 14, to the west half of Sections 13 and 24. (Exhibit T-107) The maps, photographs, and expert testimony indicate that the left bank in Sections 13 and 24 consisted of fast, stable land supporting willows and other vegetation. (Robinson 1075:13-16; 1078:10-16; 1081:17); (Exhibit T-107, composite); (Clark-358). The 1928 left bank marks the farthest eastern progression of the river in the Barrett Survey during this period. (Plate 4)

After 1928, the river migrated westward away from the 1928 eastern high bank. In 1930, the left bank of the river ran in a southeasterly direction across Sections 10 and 14. A large, continuous sand bar developed between the fast, stable land in Section 13 and the receding left bank. (Huber 2086:12-16)

The location of the river in 1930 is indicated by Exhibits T-41, V-4, T-108 and Iowa H-8. (Plate 5) Through 1932, the river continued to recede westward. (1085:17-20); Exhibit 109; (1098:23-25)

In 1936, the Corps of Engineers began construction of structures in the Blackbird Bend area designed to train the river into a fixed alignment. 433 F.Supp. at 86. (2092:10) The projects consisted of dikes and an abatis. Several private individuals[5] also constructed levees across the Barrett Survey lands. The Corps constructed dike 749.3, in a southwesterly direction across Sections 14 and 15. Exhibit, Wilson D-5. Additionally, a private structure (the Peterson levee) was built north to south across the western half of Section 13. This levee coincides with the farthest eastern progression of the river after 1923. Exhibit, Wilson I-5. Another private structure (Kirk levee) and an abatis built in the northwest corner of Section 13 also affected the course of the river across the western Barrett Survey.

The maps and photographs of the river in 1937 (Exhibit B-5) 1939 (Exhibit D-5) and 1940 (Exhibits F-5 and G-5) show the progressive westward movement of the main channel until it reached the 1940 designed channel. (Plates 6 and 7) The river receded substantially from Sections 11, 14 and 23 by 1937. In 1939, there was fast, stable land in Section 11 and in the eastern half of Section 14, supporting willows and other vegetation. By 1940-1941, the river was largely confined to a single channel which corresponded approximately to the 1943 Iowa-Nebraska Boundary Compact line. Exhibits I-8 and Wilson G-5. Intermittent channels crossed sand bars on the

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[5] Defendant's predecessors in interest, Kirk and Peterson.

left bank in Sections 10, 11, 15, 22, 23 and the western edge of Section 14. These sand bars showed characteristics of permanence, including vegetation.

Having established the location of the river during this period, this Court will review the testimony concerning the nature of the river movements.

B. The Tribe asserts all of the land west of Sections 13 and 24 in the Barrett Survey formed as accretions to eastern tribal lands. The Tribe relies upon the testimony of its own expert witnesses, Doyle Abrahamson (surveyor), Dr. Charles Robinson (geologist), and Elmer Clark (surveyor).

1. Mr. Abrahamson testified specifically concerning the location and obliteration of the "fee patented" lands in the western Barrett Survey. Exhibit T-80 (1416:1, *et seq.*) As the river moved eastward after 1923, land in the western Barrett Survey eroded away. "Fee patented" lands in Sections 10, 11, 14 and 15 were destroyed shortly after 1923. (1417-1419). Other fee land in Section 14 eroded away by 1927. (1419:17) By 1928, the river had obliterated fee land in Sections 22 and 23. (1420:8) Finally, by 1930, Abrahamson concluded "all of the fee patented tracts had been obliterated." (1420:22-23) Relinquished allotments in the western Barrett Survey were likewise eroded away by 1930. (1424:9)

   Abrahamson drew a line across the western half of Section 13. This line marked the farthest eastward progression of the river after 1923. Lands east of this line were not obliterated by the river during this period. (1425:7, *et seq.*) Additionally, this line coincided with a "relief" which Abrahamson observed on the

ground across the western half (W2) of Sections 13 and 14. (1421:18) By the term "relief," he meant a difference in elevation between the eastern "not obliterated" lands and those tracts in the western Barrett Survey. He concluded the land to the west of this "relief" constituted a continuous piece of land, extending to the present location of the river. (1422:10, 1428-20)

2. Dr. Robinson's conclusions are consistent with Abrahamson's testimony. He conducted soil composition studies of both the surface and subsurface geology of the Blackbird Bend area. (790-792) He agreed that Barrett Survey lands in Sections 13, 19, 20 and 24 were not obliterated by the river when it travelled east to its 1928-1930 position. (1292:19-22). The western Barrett Survey was part of the riverbed during this period. Dr. Robinson stated the river moved westward after 1928 and the artificial structures built in the mid-1930s aided this process. (1102:11-12) The purpose of the Corps' projects was to confine and "straighten" the river. Consequently, the river's "gradient increased and the erosive power of the river was increased, and the level (of the riverbed) dropped. . . ." (1094:3-9) Dr. Robinson concluded that the river eroded the land in the western Barrett Survey when it moved west after 1930, because the dikes and abatis caused the river to be "shortened" and because the level of the riverbed was lowered. (1096:24-25) As a result of the lower river level, land in Sections 11, 14 and 23 reemerged and became stable. (1094:11-18) These new lands were

"continuous," extending from Section 13 westward. (1097:10-16) Dr. Robinson testified that the reemergence of new land was an "imperceptible" change occurring after 1923. (1096:5-8). The western Barrett Survey land which appeared as the river receded is identifiable and in place today. (1098:25-1099:1)

3. The Tribe's witness, Mr. Clark, observed that river levels in the Blackbird Bend area reflected a wet cycle from 1920-1930 and a drought period from 1930-1940. (505:9-11) He stated the Corps' dikes and abatis, together with private structures, diverted the river westward in the Barrett Survey and prevented the encroachment of the river upon eastern Barrett Survey land. (398-399) Additionally, upstream impoundments of the river after 1935 affected the flooding, erosion, accretion and reliction of the river throughout the western Barrett Survey. (502, 520-521)

Summarily, the Tribe's witnesses agreed that western Barrett Survey lands were first obliterated by the eastward progression of the river from 1923-1928; new land reappeared in this area attaching by accretion and reliction to Sections 13 and 24 when the river eroded and receded westward from 1928-1943. Defendant's experts drew substantially the same conclusion.[6]

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[6] *See*, testimony of Dr. George Hallberg (geologist), at 2654:18, 2690, *et seq.* Significantly, Hallberg concluded the land in Section 11 was formed after 1927 by "accretion type bar deposits." (2702:8-24) And land in Sections 14 and 23, as shown on the 1940 map, were accretions to the east bank. (2708:20-2709:8) *See also*, Testimony of Mr. Huber, who

Most significant is the testimony of Mr. Raymond Huber concerning the effect of the dikes and abatis built in the Barrett Survey during this period. (2092:23, *et seq.*) The dikes served to "train the river over into the alignment which was designed by the Corps of Engineers." (2092:23-24) A dike, Huber stated, causes deposition and accretion to riparian land because it slows the current of the river.[7] (2094:3-4) Huber also referred to the private levees constructed to drain as well as to shield eastern Barrett Survey lands from encroachment by the river. (2101:3) None of these structures, he concluded, were built to cause an avulsion. (2095:10)

4. The growth of vegetation during this period, as shown by the maps and photographs, is consistent with the movement of the river by erosion against the right bank and accretion deposition and reliction to the left bank.[8] Simi-

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worked in this area for the Corps of Engineers after 1936. (1982:8; 2083:2, *et seq.*) He agreed the western and southern portions of the Barrett Survey were eroded away through 1928 and 1930. (2085:3-17; 2086:7-10) Huber concluded, generally, that from 1923 to 1940, the river moved east and then west, by erosion and accretion. (2102:23-2103:3).

[7] An abatis likewise slows the flow of the river, causing deposition downstream as well as upstream. (2131:20-25) Huber testified an abatis in the Barrett Survey formed accretions in Section 14. (2143:17)

[8] The Court of Appeals noted: "A large stand of timber shown in the northwest corner of the Barrett Survey area prior to 1923 was no longer visible in a 1927 aerial survey of the area, indicating the land on which it stood had been eroded." 575 F.2d at 649, n. 65.

larly, soil samples taken from the western Barrett Survey consist primarily of silts, fine sand or very fine sand. Exhibit, Gov't 151. These materials are not cohesive and are easily erodable. (2587:13-16) These are soils typically deposited in an alluvial floodplain following the migration of a river.

C. *The State of Iowa's island and abandoned channel theory*

Under the terms of the Iowa Nebraska Boundary Compact, the area claimed by the State of Iowa was ceded by the State of Nebraska. Therefore, Nebraska law governs title claims based upon land formed in this area prior to the Compact date of July 12, 1943. *Nebraska* v. *Iowa*, 406 U.S. 117, 120 (1972). However, Iowa law controls events occurring after the Compact date. *State* v. *Simmons*, 290 N.W. 2d 589, 593 (1980), *cert. denied*, 101 S.Ct. 123 (1980). In Iowa, the State owns the bed of all navigable streams from the ordinary high water mark to the "thread" or center of the stream, as well as all islands arising therefrom. *Mather* v. *State*, 200 N.W. 2d 498, 500 (Iowa 1972). In Nebraska, the riparian proprietor owns the riverbed to the thread of the stream and all islands which develop by accretion to the stream bed. *Valder* v. *Wallis*, 196 Neb. 222, 242 N.W. 2d 112 (1976); *Theis* v. *Platte Valley Public Power and Irrigation District*, 137 Neb. 334, 289 N.W. 386 (1930).

The State of Iowa admits the western edge of the Barrett Survey was part of the bed of the Missouri River between 1923 and 1931.[9] The State, however,

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[9] Iowa Proposed Findings and Conclusions, on Remand, No. 40. *See*, Exhibits R-4, S-4, V-4, Y-4, 41 and 42.

asserts the land it claims consists of an island and exposed, abandoned river channels which did not form until after 1943. These lands, the State contends, developed in the Iowa portion of the riverbed, apart from the Iowa high bank. Therefore, the State of Iowa claims title to the tracts based upon the Equal Footing Doctrine and the doctrine of state ownership of the bed of navigable streams. *Montana* v. *United States*, —— U.S. ——, 67 L.Ed. 2d 493 (1981); *Oregon, ex rel. State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 353 (1977); *State* v. *Simmons, supra*; *Mather* v. *State, supra.*

The Tribe contends that the land occupying the area the State claims developed as accretions and relictions to riparian tribal land, not as an island or abandoned channel. The United States argues, alternatively, that if an island did form, it was a permanent formation prior to 1943. Under Nebraska law, the Government and the Tribe, as riparian land owners, would also own the "island."

The state's claim under the doctrine of state ownership of the bed and banks of navigable rivers is inconsistent with the theory upon which it relied at the close of the trial of this case. The State joined in the post-trial brief of defendants, in which the State asserted the eastward movement of the river from 1923-1930. Thereafter, the State agreed the river moved westward by accretion to the left bank.[10] Significantly, the State also joined in defendant's statement that, ". . . all parties agree that the fee patented lands were eroded away and washed down the river. They disagree as to the ownership of the land to which the accretion land, now occupying the area

[10] Defendant's Post-Trial Brief, filed February 16, 1977, at p. 30.

formerly occupied by the fee patented land, became attached." [11] The State's position at the close of trial was that the land it claims formed as accretions to riparian mainland owned by other defendants, who conveyed their interest in such lands to the State by quit claim deeds. Specifically, the State joined in asserting Proposed Conclusion of Law, No. VII, which concluded that all of the land within the Barrett Survey formed as accretions to the left or Iowa bank, prior to 1943.

The State on remand, however, proposed that the land it claims did not accrete to the left bank prior to 1943. Instead, it asserts the tracts formed as an island accreting to the riverbed apart from the left bank, and as an abandoned river channel, after 1943.

An island traditionally is defined as a permanent body of land, separate and distinct from the mainland, and above mean high water. An island must be surrounded by distinct channels of the river, which separate the island from the mainland. *Burket* v. *Krimlofski*, 167 Neb. 45, 91 N.W. 2d 57 (1958); *Summerville* v. *Scotts Bluff County*, 182 Neb. 311, 154 N.W. 2d 517 (1967); *State* v. *Raymond*, 119 N.W. 2d 135 (Iowa 1963); *Mather* v. *State*, *supra*.

The State of Iowa presented no testimony at trial to support its post-1943 "island" and abandoned channel theory. Nonetheless, the State refers to maps and aerial photographs of the western Barrett Survey.[12] These exhibits allegedly trace the development of an "island" adjacent to and south of dike No. 749.3, in

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[11] *Id.* at 46.

[12] Exhibits Wilson K-K, L-L (photographs of dike); Wilson Exhibits B-5 (1937 Corps map); F-5 (1940 map); G-5 (1941 map); *see also*, Wilson Exhibits J-5, K-5, and M-5; Iowa Exhibits H08, I-8, K-8 (Mylar overlays).

Sections 14, 15 and 23. The area adjacent to and north of the dike is the land the State claims as an abandoned river channel. A 1944-1945 aerial photographic mosaic, the State concludes, depicts an "island" in permanent existence for the first time. Wilson Exhibit H-5. The State claims this island formed as a sandbar within the Iowa portion of the riverbed, separated at all times from the Iowa shore by a well-defined channel.[13]

In considering a claim that an island arose from the riverbed, separated from both riparian banks, certain evidence is relevant. For example, in *Tyson* v. *State of Iowa*, 283 F.2d 802 (8th Cir. 1960), the Eighth Circuit Court of Appeals considered eye witness testimony, photographs, land surveys, and dendrochronology studies reporting the size, age and location of vegetation. In this case, the State offered no testimony, eye-witness or otherwise, supporting the development of an island and abandoned river channel. This fact is particularly remarkable in view of the time period involved. Witnesses would certainly be available to testify concerning developments occurring only after 1943. The State offers no photographic evidence of its theory, however.

Specifically, the State relies upon the 1944-45 photomosaic, depicting the "island" as a permanent formation. On this basis, the State contends the island could not have developed prior to 1943. Unfortunately, no photograph offered by the State depicts the

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[13] The State argues that dike 749.3 contributed to the development of Ivy Island from a sandbar in the riverbed. In its Proposed Findings and Conclusions, post-trial, however, the State asserted, "[t]hese dikes and abatis had the effect of forming accretion to the Iowa riparian land adjacent to the dikes (2093:24)." at p. 86.

area as it appeared *in 1943*. There is a gap of three years in the State's proof—from 1941 (photo exhibit G-5) to 1944-1945 (exhibit H-5). The States [sic] wishes this Court to speculate concerning the permanence of the land it claims in light of the development of vegetation. It is, however, only an "educated guess" by the State that vegetation appearing in 1944 was not also present and permanent before 1943. Indeed, the land in the area of the State's claims does appear to be supporting some vegetation in the 1941 aerial photograph. Additionally, the Tribe offered Exhibit 105A, a summary of a dendrochronology study of Blackbird Bend conducted by George S. Gorsuch. (1357:4, *et seq.*). In the area comprising the State's claimed "island," the study located some cottonwoods aged forty-two years, originating in 1943. It is undisputed that cottonwoods are secondary vegetation, which will not grow until after the land is dry, established, and capable of supporting primary growth, such as willows. 433 F.Supp. at 76. As the Court of Appeals stated, ". . . vegetation does not usually appear on a sandbar until it has been in existence for several years." 283 F.2d at 810.

Therefore, this Court concludes the State, on remand, referred to only speculative evidence concerning its claim that Ivy "Island" was a permanent formation only after 1943. Moreover, the State cited no testimony concerning the formation of an independent island—in order to refute its previous position that the land comprising Ivy "Island" constituted accretions to the left bank. The State offered no evidence at trial concerning the nature of the channel which it claims separated the "island" from the left bank. Aerial photographs taken in 1945 and 1954 could equally support the conclusion that Ivy "Island"

was surrounded by water "only when the river [was] high and connected with the mainland when the river [was] low." *Mather* v. *State*, 200 N.W. 2d 498, 501 (Iowa 1972). In fact, Doyle Abrahamson testified that the stream appeared to the east of the "island" after the land had already formed as accretions and relictions to the left bank. (1427:19-1429:14). Accordingly, the Tribe argues it retains title to the accretions. This position is consistent with the law of Nebraska, which provides, "[w]here an accretion was begun by a deposit against the shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the mainland owner." *Independent Stock Farm* v. *Stevens*, 259 N.W. 647, 649 (Neb. 1935).

FINDINGS OF FACT ON THE MERITS

From all the evidentiary matters considered, the Court finds:

1. That in 1923, the Missouri River cut entirely across Nebraska Sections 10, 11, 14 and 15, within the Barrett Survey. By the process of erosion, the riverbed and the left bank were obliterated.

2. That from 1923 to 1928, the river gradually migrated eastward in the Barrett Survey. During this migration the river eroded and obliterated land occupying the left bank and the riverbed. The 1928 left bank of the river represented the farthest eastern migration of the river in the Barrett Survey after 1923.

3. That in 1928, the left bank of the river occupied the west half of the west half of Sections 13 and 24. The river occupied substantially all of the tracts claimed by the State of Iowa as well as the entire area

described in fee patents which individual defendants claimed. As a result of the erosion of the river through 1928, all of the land within the Barrett Survey west of the 1928 left bank was obliterated and no identifiable land remained in place.

4. That from 1928 to 1943, the Missouri River reversed its direction and migrated westward over the Barrett Survey. The river further eroded and excavated the right bank and gradually and imperceptibly deposited silt and sediment upon the left bank. These accretions attached to fast, stable land in Sections 13 and 24 which were riparian to the left bank of the river between 1927 and 1930.

5. That artificial structures, including an abatis, dikes and levees were constructed across the western Barrett Survey by both the Corps of Engineers and private individuals. The purpose of these structures was to create accretions to land adjacent to the structures, to drain or protect eastern Barrett Survey lands, and to train the river into a designed channel. These structures contributed to the gradual subsidence of the river, westward, from the 1928 left bank. By this additional process of reliction, new lands were uncovered and added to the left bank.

6. That by 1943, the accretions and relictions were new lands contiguous to Sections 13 and 24 and continuous westward to the present location of the Missouri River. Subsequent to the formation of these continuous accretions, an intermediate stream cut across Sections 10, 11, 14, 15, 22 and 23. This stream separated accretions adjacent to the Iowa-Nebraska Compact Line from the mainland, thereby creating the body of land known as Ivy "Island." Ivy "Island," therefore did not form by accretion to the riverbed, below the ordinary high watermark.

7. That the State of Iowa presented no evidence to establish a factual predicate for its conclusion, on remand, that the land south of dike No. 749.3 formed as an island in the Iowa portion of the riverbed after 1943 or that the land north of dike No. 749.3 is an abandoned river channel. This Court's findings concerning the tracts claimed by the State of Iowa are not based upon inferences drawn from any weaknesses in the State's evidence tending to prove its island and abandoned channel theory. Rather, the findings of this Court are based upon the clear preponderance of the evidence, presented by both the Tribe and defendants, that the river changed during this period by creating continuous accretions and relictions to the left bank riparian land.

8. That there is no substantial evidence defendants or their predecessors possessed any fee patented tracts during the time the river occupied the western Barrett Survey from 1923 to 1930.[14] The dry lands defendants occupied after the river finally receded from the western Barrett Survey were not the original fee patented lands. The defendants entered upon new lands formed by accretion and reliction to stable land in Sections 13 and 24. These accretions replaced the fee patented tracts which were eroded and washed away by the river prior to the entry by defendants or their predecessors.

9. That no party to this case either pleaded or submitted evidence to prove that the river moved by avulsion from 1923-1943.

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[14] For example, concerning the fee patented tracts, counsel for defendant stated: "We know nothing about them being abandoned except nobody was occupying them while they were in the bottom of the river." (113:8-10)

CONCLUSIONS OF LAW

1. The Court of Appeals ordered this Court to quiet title to the trust lands involved in this action, except those claimed by the State of Iowa, in the United States as trustee, and in the Omaha Tribe. This order establishes as the law of this case that the Tribe is the owner of all Barrett Survey land east of and including Sections 13 and 24. Additionally, based upon the Court of Appeals' mandate, the United States and the Tribe own those allotted parcels to which trust patents were issued but subsequently relinquished or cancelled—except those claimed by the State of Iowa.[15] The river movements relevant to the ownership of the remaining lands within the western Barrett Survey are those described above, which occurred from 1923-1943. Both the Tribe and the defendants offered proof that the river changed by accretion and reliction.

2. Federal law, borrowing the Nebraska rule of decision, governs this Court's determination of river movements over Barrett Survey land. The prior opinions in this case set out the law of accretion and reliction in Nebraska. 433 F.Supp. at 62-65; 575 F.2d at 633-639; 614 F.Supp. at 1156-1160. Two elements

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[15] Allotted lands are owned by the United States, as trustee, for the benefit of the allottee. *See*, 25 U.S.C. § 348; *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970); *County of Thurston, State of Nebraska* v. *Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1978). It follows that the allotted tracts remain trust lands whether the patent is subsequently relinquished or cancelled under 25 U.S.C. § 344. As such, the tracts are governed by the Court of Appeals' order to quiet the Tribe's title in trust lands claimed by the individual defendants.

are essential to a finding of accretive changes in a river: First, "[a] boundary changes only where the river's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of identifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated." 614 F.2d at 1157; *State* v. *Ecklund*, 23 N.W. 2d 782, 789 (Neb. 1946); second, ". . . no matter how 'rapid and great' is 'the abrasion and washing away,' or 'the diminution' of soil, the accretion (or reliction) of soil 'is always gradual and by imperceptible deposit of floating particles of earth.'" 614 F.2d at 1157, *quoting*, *Nebraska* v. *Iowa*, 143 U.S. 359, 368-369 (1892). Both elements must be present.

"Reliction" is the term applied to land added and uncovered by a gradual subsidence of water from any cause. *Durfee* v. *Keiffer*, 168 Neb. 272, 95 N.W. 2d 618 (1959); *Jones* v. *Schmidt*, 170 Neb. 351, 102 N.W. 2d 640 (1960); *Dartmouth College* v. *Rose*, 172 Neb. 764, 112 N.W. 2d 256 (1961). Land added by either accretion or reliction to riparian land is the property of the riparian owner. *Id.*; *Fontenelle* v. *Omaha Tribe of Nebraska*, 298 F.Supp. 855, 859 (D. Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970).

3. The Tribe sustained its burden of proving, by a clear preponderance of the evidence, (a) that the tracts claimed by the State of Iowa were washed away by the action of the river eroding its bed and banks; and (b) that by a gradual and imperceptible process of deposition and reliction, new lands were created which attached to and extended westward from riparian tribal trust lands in Sections 13 and 24, continuously, to the present location of the river. The

State of Iowa, therefore, has no claim or right thereto based upon river movements occurring after 1923.[16]

The Tribe proved the accretions and relictions to tribal land were caused, in part, by the projects of both the Corps of [E]ngineers and private individuals.

It is well settled that the fact that artificial means caused, in whole or in part, the working of the processes of accretion or reliction does not affect the rule that a riparian owner takes new land formed against his tract. *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), *rev'd on other grounds*, 429 U.S. 363; *County of St. Clair* v. *Lovingston*, 90 U.S. 46 (1874); *Duke* v. *Durfee*, 215 F.Supp. 901 (D. Mo. 1961), *rev'd on other grounds*, 308 F.2d 209 (8th Cir. 1962), *rev'd*, 375 U.S. 106 (1963); *Kansas* v. *Meriwether*, 182 Fed. 457 (8th Cir. 1910). In *Krumweide* v. *Rose*, the Nebraska Supreme Court referred to a channeliza-

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[16] The State's claim to western Barrett Survey lands based upon quitclaim deeds from other defendants also fails. A quitclaim is used by a grantor to convey only such interest as he has, in contradistinction to a grant of the fee or other estate with warranty of title. *United States* v. *Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915 (1977); *Walters* v. *Walters*, 231 Iowa 1267, 3 N.W. 2d 595 (1942); *Mack* v. *Tredway*, 244 Iowa 240, 56 N.W. 2d 678 (1953); *Swab* v. *Appanoose Country Club*, 203 N.W. 2d 318 (Iowa 1972); *Kennedy* v. *Potts*, 128 Neb. 142, 258 N.W. 471 (1935); *Smith* v. *Berberich*, 168 Neb. 142, 95 N.W. 2d 325 (1959). "[U]nder a conveyance by a quitclaim deed the grantee can acquire no better interest than the grantor had. If the grantor himself has no title or interest to the property conveyed, most courts hold that the grantee takes nothing under a quitclaim deed. . . ." 23 Am.Jur. 2d, *Deeds* § 291, at p. 324. Based upon this Court's findings and conclusions, the individual defendants had no title to western Barrett Survey land. It follows that the State takes no title under a quitclaim deed from the defendants.

tion project similar to that of the Corps of Engineers in this case. The court held, ". . . this development work finally resulted in the destruction of the western channel . . . and the acceleration of accretion. . . . The fact that third parties performed construction work and accelerated these processes does not alter the application of the rule as to ownership of accretion land." 177 Neb. 570, 129 N.W. 2d 491, 496 (1964). *Accord, Valder* v. *Wallis*, 196 Neb. 222, 242 N.W. 2d 112 (Neb. 1976); *Krimlofski* v. *Matters*, 174 Neb. 774, 119 N.W. 2d 501 (1963); *Ziembar* v. *Zeller*, 165 Neb. 419, 86 N.W. 2d 190 (1957).[17]

4. By virtue of the Court of Appeals mandate, the United States, as trustee, and the Tribe own trust lands in Sections 13 and 24 of the Barrett Survey. These lands were riparian to the 1928 left bank of the Missouri River, when it moved easterly in the Barrett Survey. Accretions to land owned by the United States in Sections 13 and 24 are also lands owned by the United States. *United States* v. *Boyd*, 458 F.2d 1252 (6th Cir. 1972); *United States* v. *Claridge*, 416 F.2d 933 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970); *Beaver* v. *United States*, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). This general rule applies equally to lands which the United States owns in trust for an Indian tribe. *Wilson*, 442 U.S. at 673; *Fontenelle* v. *Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970); *United States* v. *Flowers*, 108 F.2d 298 (8th Cir. 1939); *Newman* v. *United States*, 504 F.Supp. 1187 (D. Ariz. 1981).

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[17] *See also*, Lundquist, *"Artificial Additions To Riparian Land: Extending the Doctrine of Accretion*, 14 Ariz. L. Rev. 315 (1972); Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N.D. L. Rev. 429, 449 (1967); 63 A.L.R. 3d 249.

5. The Court of Appeals first observed that "[t]he Government excepted from its complaint any claim to approximately 400 acres of land which may have been allotted to individual Indians and subsequently patented to non-Indians." 575 F.2d at 651, n.70. The United States Supreme Court also noted several hundred acres of land within the Barrett Survey were claimed as fee patented lands. 99 S.Ct. at 2529. Individual defendants, as well as the State of Iowa, claimed title to the "fee patented" lands under Nebraska laws regarding adverse possession, statutes of limitation and laches.[18] The Tribe, however, proved defendants never possessed the actual land described in the fee patents because the river obliterated and eroded the fee lands prior to defendants entry thereupon. The lands defendants occupied after the river finally receded were accretions to eastern tribal lands in Sections 13 and 24. Consequently, the Tribe argued the defendants cannot adversely possess accretions to Indian trust lands, nor may state statutes of limitation or laches operate to divest Indian title.

It is true that Indian lands, once patented in fee, lose their status as trust lands and are governed by state law. *Larkin* v. *Paugh*, 276 U.S. 431 (1928); *Oregon ex-rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977); *Wilson*, 442 U.S. at 671. This Court finds and concludes, however, the Tribe established by a preponderance of evidence that the river eroded the lands in the western Barrett Survey area, including those described in the fee patents, and replaced those lands with accretions and relictions to trust lands in place in Sections 13

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[18] Neb. R.R.S., § 25-202 (1943).

and 24.[19] In both Nebraska and Iowa, the effect of such a movement of the river is to destroy the title to the land obliterated by the movement of the river. *State* v. *Matzen*, 197 Neb. 592, 250 N.W. 2d 232 (1977); *Winkle* v. *Mitera*, 195 Neb. 821, 241 N.W. 2d 329 (1976); *Rupp* v. *Kirk*, 231 Iowa 1387, 4 N.W. 2d 264 (1942); *Wilcox* v. *Pinney*, 250 Iowa 1378, 98 N.W. 2d 720 (1959). This Court cannot, therefore, apply state laws of adverse possession or laches based

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[19] The defendants contended 25 U.S.C. § 194 did not operate to place upon them the burden of proof concerning river movements affecting "fee patented" lands. This Court need not address that issue. Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds the Tribe established by a clear preponderance of the evidence its right and claim to the land occupying the area described in the fee patents.

There can be no doubt, however, that 25 U.S.C. § 194 has been a determinative factor in the outcome of this case. In the Appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago. This Court firmly believes the statute thereby provided the Tribe an unconscionable advantage in this litigation. Moreover, the statute arguably operated to deprive these defendants of their constitutional right to equal protection under the law. In this age, Indian Tribes are often sophisticated corporations which litigate claims using the legal and financial resources of the United States Government. Consequently, this Court believes the special treatment afforded an Indian Tribe under 25 U.S.C. § 194 no longer "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). Although this issue was not properly before this Court, we would welcome a challenge of the statute, on constitutional grounds, in future cases.

upon the former title to the lands in fee patent.[20] Application of those laws, if at all, must be based upon the present character of the title to the accretions.

It is well settled that title by adverse possession, laches, or statutes of limitation cannot be asserted against the United States, *United States* v. *Denby*, 522 F.2d 1358 (5th Cir. 1975), *reh. denied*, 525 F.2d 693 (5th Cir. 1975); against *land* which the United States owns in trust for an Indian tribe, *United States* v. *7,504.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527 (N.D. N.Y. 1977); *Schaghticoke Tribe* v. *Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); or agaist land which the United States gains by accretion. *Jackson* v. *United States*, 56 F.2d 340, 343 (9th Cir. 1932); *Beaver*, *supra*; *Claridge*, *supra*. Since the lands which defendants eventually occupied in the western Barrett Survey were no longer the fee patented lands, but were accretions to tribal lands owned by the United States for the Omaha Tribe,[21] the defenses of adverse pos-

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[20] Defendants do not claim to derive title from any original fee patent holder. Rather, they assert title by adverse possession. This current theory presumes the continued existence of the land described in the fee patents, but is inconsistent with defendants' theory at trial—that *all* of the Barrett Survey lands were destroyed by the river. 433 F.Supp. at 71.

[21] This Court holds defendants did not begin to establish the "possession" required by law to constitute an adverse possession, until the river finally receded from the areas described in the fee patents, sometime after 1930. *Weiss* v. *Meyer*, 208 Neb. 429, 303 N.W. 2d 765 (1981). Similarly, in *Pokorski* v. *McAdams*, 204 Neb. 725, 285 N.W. 2d 824 (1979), the Nebraska Supreme Court held that a plaintiff did not establish an adverse possession. During the time the river

session, etc., are meritless. The new lands forming westerly from Sections 13 and 24 became tribal lands which never were allotted or conveyed to a restricted Indian. The law compels this conclusion even though the new lands occupied the same area described in the fee patents. *See, e.g., United States* v. *Russell*, 261 F.Supp. 196 (E.D. Okl. 1966).

Defendants cite *Dillon* v. *Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974) for the rule that fee patent land owned by an Indian may be acquired by adverse possession. *Dillon* did not concern land destroyed or created by accretion and reliction. Defendants continue to equate the precise fee patent land lost by erosion, with the land they occupied when the river finally receded from this area. This premise is groundless in view of the undisputed evidence, offered by both the Tribe and defendants, establishing the destruction of the fee lands by erosion.

6. The defendants finally assert the refusal of the United States to claim the former fee patented lands precludes the Tribe from so doing. Admittedly,

> ". . . when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose *relating to the same property.*" *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 370 (1968) (Emphasis added)

But this rule does not bar the Tribe from recovering tribal lands when the United States refuses to claim

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occupied the land involved, the court found "no persuasive evidence that there was any land present . . . which was subject to adverse possession." *Id.* at 827.

the same lands on behalf of the Tribe, or from recovering lands in addition to those the Government claims.

This Court concludes the Tribe may bring an action to recover accretions to tribal lands, notwithstanding the refusal of the United States to add these lands to its complaint in these consolidated cases. Clearly, ". . . Congress intended by (28 U.S.C.) § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act." *Fort Mojave Tribe* v. *Lafollette*, 478 F.2d 1016, 1017 (9th Cir. 1973). "In recovering these lands, the Indians assert not merely their own rights of occupancy, but the sovereign claims of the United States as well." *Schaghticoke Tribe*, 423 F. Supp. at 784. *See also, Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 470, 473 (1976); *Capitan Grande Band of Mission Indians* v. *Helix Irrigation District*, 514 F.2d 465 (9th Cir. 1975). Accordingly, since the defenses of adverse possession, statutes of limitation, and laches would not be available had the United States claimed the accretions attaching to tribal trust lands, *Board of Commissioners* v. *United States*, 308 U.S. 343, 351 (1939); *United States* v. *Schwarz*, 460 F.2d 1365, 1371-1372 (7th Cir. 1972); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957), the defenses will not apply to claims by the Tribe, on its own behalf, to recover the same lands. *Schaghticoke*, 423 F.Supp. at 784-785.

For the above-mentioned reasons, this Court concludes the defendants have no right or claim to any land in the western Barrett Survey, including the lands occupying the area described by fee patents.

This Court does not deviate from its original judgment that the Missouri River moved over the Barrett Survey—in all relevant periods—by accretion to the left or Iowa bank. Contrary to this Court's original decree, however, the Tribe prevails on remand. The Court of Appeals effectively determined this outcome when it quieted title in the Tribe to eastern Barrett Survey lands. Any accretion to the left bank, therefore, added to land which the Court of Appeals held was owned by the Tribe. This Court will not change its view of the evidence and cannot change the mandate of the Court of Appeals.

IV. IMPROVEMENTS

The defendants interpose a counterclaim against the United States for the value of improvements they made upon lands, title to which is now quieted in the Tribe. The defendants assert two theories in support of the counterclaim. First, they contend the general principles of equity are binding upon the United States. As a condition of obtaining equitable quiet title relief, the government must do equity by reimbursing the defendants for improvements. Second, the defendants assert that Nebraska law governs the claim for improvements and that they are entitled to recover under the Nebraska Occupying Claimants Act (NOCA), Neb. R.R.S., 1943 §§ 76-301 to 76-311. The United States opposes the claim for improvements for two reasons. The government contends sovereign immunity bars the claim. Additionally, the United States argues NOCA cannot apply to this action. For the following reasons, this Court concludes defendants' counterclaim for improvements is barred by the sovereign immunity of the United States.

The United States may be sued, even by counterclaim, only when the government has waived its immunity from suit. *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *Agnew*, 423 F.2d 513 (9th Cir. 1970). The terms of its consent to be sued define any court's jurisdiction to entertain the suit. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Moreover, no waiver of sovereign immunity may be implied, but must be expressed unequivocally. *United States* v. *Testan*, 424 U.S. 392, 399 (1976). There is no generally implied waiver of sovereign immunity when the United States commences an action. *Federal Savings & Loan Insurance Corp.* v. *Quinn*, 419 F.2d 1014 (7th Cir. 1969).[22]

Defendants assert the Government is bound, in equity, to pay the value of improvements since it seeks equitable relief. Defendants cite both *United States* v. *Desert Gold Mining Co.*, 448 F.2d 1230 (9th Cir. 1971), and *Lacy* v. *United States*, 216 F.2d 223 (5th Cir. 1954), and conclude "[t]he Government, when applying for relief in a court of equity is as much bound to do equity as is a private litigant." *Id.* at 225. Even the Court in *Lacy*, however, agreed that this principle cannot be pressed to the extent of waiving the United States' sovereign immunity to suit by way of counterclaim. *Id.*

To interpose a counterclaim for improvements, defendants must either, (1) establish the statutory con-

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[22] The Federal Rules of Civil Procedure, Rule 13(d) affirms the general principle of sovereign immunity. It specifically states Rule 13 (regarding compulsory and permissive counterclaims) does not extend the right of a party to sue the United States beyond the limits established by statute. Wright & Miller, Federal Practice & Procedure: *Civil* § 1427, p. 139 (1971); *United States* v. *Longo*, 464 F.2d 913 (8th Cir. 1972).

sent of the United States to the suit, or (2) state a claim in recoupment arising out of the same transaction as the claim of the United States, to which the Government impliedly consents. *United States* v. *Chatham*, 415 F.Supp. 1214 (D. Ga. 1976); *United States* v. *Holder*, 292 F.Supp. 826 (D. Iowa 1968). Defendants do not identify any statute by which the Government consents to a counterclaim for improvements. Consequently, the counterclaim fails if it does not qualify as a claim in recoupment or set-off.

Without violating the doctrine of sovereign immunity, a defendant may assert, by way of recoupment, any claim arising out of the same transaction or occurrence as the original claim, in order to defeat or reduce the Government's recovery. *Frederick* v. *United States*, 386 F.2d 481 (5th Cir. 1967); *see generally*, Note, *Governmental Immunity from Counterclaim*, 50 Colum. L. Rev. 505 (1950). Even within the recoupment exception, however, the Government "does not waive sovereign immunity to counterclaims . . . which claim relief in excess of or different in kind from that sought by the Government." *In re Oxford Marketing Ltd.* v. *Kallen*, 444 F.Supp. 399, 403 (N.D. Ill. 1978). Accordingly, when the United States sues to quiet title, the Government consents to counterclaims by defendants seeking to quiet title in their names. *United States* v. *Phillips*, 362 F.Supp. 462 (D. Neb. 1973).

A recoupment is the right of a defendant, "to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation . . . or because he has violated some duty which the law imposes upon him. . . . 20 Am. Jur. 2d., *Counterclaim, Recoupment and Setoff*, § 1, p. 228 (1965). "It means a deduction from a money claim whereby cross de-

mands arising out of the same transaction are allowed to compensate one another, the balance only to be recovered." *Id.* For example, in an ejectment action, wherein plaintiff seeks mesne profits, the defendant may counterclaim to recoup the value of improvements. *Deakyne* v. *Lewes Anglers, Inc.*, 204 F.Supp. 415 (D. Del. 1962). In an action by the United States to collect an income tax deficiency, a counterdemand for recoupment of an overpayment of estate taxes may be asserted in defense. *Bull* v. *United States*, 295 U.S. 247 (1935).

When the United States, however, does not seek monetary relief, but only the return of property, the court lacks jurisdiction to entertain a counterclaim for monetary relief. In *United States* v. *Ameco Electronic Corp.*, 224 F.Supp. 783 (E.D. N.Y. 1963), the Government sought a replevin action to recover chattels wrongfully withheld by the defendant. The court dismissed the defendant's counterclaim for damages based on unjust enrichment because the claim did not fall within the United States' waiver of immunity for claims in recoupment.

> Recoupment and set-off . . . are restricted to a reduction or in discharge of the principle claim. To accomplish this result, the claim of both the plaintiff and the defendant must be fungible obligations which can be set-off against each other. . . . The Government is not seeking a judgment for a sum of money but is asserting title to certain chattels. The very nature of the action makes it impossible to reduce or discharge the claim by recoupment or set-off. *Id.* at 786.

Similarly, in *United States* v. *Drinkwater*, 434 F. Supp. 457 (E.D. Va. 1977), the court dismissed counterclaims seeking both damages and equitable

relief because the United States sought only to quiet its title to certain land.[23]

In this case, the United States seeks only to quiet title to land lying within the original boundaries of the Omaha Indian Reservation. The Government does not request the payment of damages for trespass, or for rents and profits related to the period of defendants' occupancy of the land.[24] The United States' claim, therefore, does not involve a fungible obligation against which defendant's claim for improvements may be off-set. Since the counterclaim does not constitute a claim in recoupment, this Court lacks jurisdiction to entertain the claim. No specific waiver of sovereign immunity exists, express or implied, which would permit defendant's recovery of the value of improvements against the Government. *United States* v. *Gregory Park, Section II, Inc.*, 373 F.Supp. 317 (D. N.J. 1974).

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[23] *See also, United States* v. *Thurber*, 376 F.Supp. 670 (D. Vermont 1974), a mortgage foreclosure action by the United States wherein the Court dismissed counterclaims for damages because the United States did not seek a deficiency judgment or damages.

[24] The Tribe seeks the payment of damages for trespass upon Barrett Survey lands. But that claim of the Tribe was severed and is not properly before this Court in these consolidated cases. It may be that defendant's claim for improvements could be asserted as an off-set to the Tribe's claim, even though the Tribe possesses a common-law immunity from suit which is interpreted similarly to the sovereign immunity of the United States. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1676 (1978); *Chemehuevi Indian Tribe* v. *California State Board of Equalization*, 492 F.Supp. 55 (N.D. Cal. 1979). The defendants, however, stated in their brief, on remand, that they made their counterclaim for improvements only against the United States. Defendant's Reply Brief, "On . . . Improvements," at p. 11.

This Court is painfully aware of the record in this case concerning the character of improvements made by defendants and their predecessors. *Wilson*, 433 F. Supp. at 69, 87. This Court further recognizes the obvious principle of equity, that the owner of land has not just claim to anything except the land itself. The true owner should not, without compensation, take valuable and permanent improvements constructed by a claimant in the erroneous belief that he is the owner. While there is a strong policy argument for adjudicating defendant's claim for improvements in this action, ". . . Congress has not so declared." *Shaw*, 309 U.S. at 502. The absence of a specific waiver of the Government's sovereign immunity limits the jurisdiction of this Court to grant such equitable relief.

This Court, therefore, need not address defendant's claim that the Nebraska Occupying Claimants Act should be applied to determine the value of improvements. Defendants stated in their brief:[25] "We do not take the position that the Nebraska Occupying Claimants Act governs directly. . . . We contend only that a Federal court sitting as a court of equity should follow the Act in exercise of its general equitable powers. . . ." In support of this position, defendants cite *Leighton* v. *Young*, 52 Fed. 439 (8th Cir. 1892). *Leighton* did not concern improvements upon Indian lands, nor was an Indian tribe or the United States a plaintiff in that case. The Court of Appeals, however, recognized two relevant principles. First, the Court of Appeals observed, "[t]he equity practice in the courts of the United States is not regulated by state statutes. *Id.* at 443. Second, the Court noted,

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[25] Defendant's Reply Brief on Improvements, p. 12.

". . . under the Nebraska statute the value of improvements is simply declared to be a lien on the land. . . ." *Id.* at 444. *See,* Neb. RR.S § 76-306 (1943). To be more precise, NOCA § 76-310 provides that the title of the true owner may be divested by the terms of the Act if the unsuccessful claimant is not paid the value of his improvements.[26]

Clearly, state laws, such as the occupying claimants laws, cannot be used by federal courts, sitting in equity, to encumber or possibly divest the title of the United States to Indian lands. The United States Supreme Court held in this case, that "Indian title is a matter of federal law and can be extinguished only with federal consent. . . ." 99 S.Ct. at 2539. Congress has not consented to the operation of NOCA in respect to lands which the Government owns in trust for the Omaha Indian Tribe.

V. MOTIONS FOR SUMMARY JUDGMENT

The defendants moved this Court, pursuant to Federal Rules of Civil Procedure, Rule 56, for its order granting summary judgment in their favor. By these motions, defendants request the Court to dismiss the Tribe's claims to lands outside the Barrett Survey in Blackbird Bend and to quiet the title of defend-

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[26] Neb. R.R.S. § 76-310. The occupant or claimant shall in no case be evicted from possession, or deprived of his right in the premises, except as provided in sections 76-308 and 76-309, and in case the successful claimant shall neglect to elect to take said real estate with improvements, or to convey the same to the occupant or claimant, within such time as the court shall direct, then decree shall be entered in favor of the occupant or claimant upon his payment in court the value of the real estate without improvements. Such decree shall have the effect to transfer and convey to such occupant or claimant title and rights of the successful claimant.

ants to the same lands. Additionally, defendants seek, by summary judgment, the dismissal of the Tribe's claims for damages for the alleged trespass of defendants upon all Blackbird Bend lands.

Essentially, defendants repeat the arguments in their motions for summary judgment that they made in support of their claim to the "fee patented" land within the Barrett Survey. First, defendants assert they do not have the burden of proving their superior title under 25 U.S.C. § 194. Since the Blackbird Bend land outside the Barrett Survey was not part of the original reservation established by the 1854 Treaty, defendants allege the Tribe cannot demonstrate the "previous possession or ownership" which triggers the statute. Therefore, the Tribe has the burden of proving its claim to Blackbird Bend land. Additionally, defendants assert that the Tribe's claim to land outside the original reservation arises out of state law, not federal.

Since the Tribe does not claim Blackbird Bend land as original tribal trust land, defendants conclude the Tribe's claim is barred by state laws of adverse possession, statutes of limitation and laches. Because the United States is not joined in the severed cases concerning title to land outside the Barrett Survey, the government's sovereign immunity cannot preclude the operation of the defenses of adverse possession, etc. Defendants finally argue the Tribe admitted that defendants and their predecessors occupied the Blackbird Bend lands for forty years. They conclude no genuine issue of material fact exists in dispute of defendants' claims by affirmative defenses.

In the Eighth Circuit, motions for summary judgment are considered "a harsh remedy . . . to be granted sparingly. . . ." *McLain* v. *Meier*, 612 F.2d

349, 355 (8th Cir. 1979). Rule 56 provides that summary judgment may be granted when the matters considered by the court disclose "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See*, Wright & Miller, *Federal Practice & Procedure, Civil* § 2725 (1973). The moving party has the burden of establishing the non-existence of any genuine issue of fact, and all doubts are resolved against him. *Walling* v. *Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943). The Court of Appeals holds that a summary judgment should be granted only if the truth is clear, *Trayler* v. *Black, Sivalls & Bryson, Inc.*, 189 F.2d 213 (8th Cir. 1951); or unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy and he shows affirmatively that the opposing party cannot prevail under the circumstances, *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972); or unless the facts entitling the movant to summary judgment are admitted or are clearly established.

The defendants failed to demonstrate the nonexistence of a genuine issue of material fact. One factual issue in dispute concerns the nature of river movements in Blackbird Bend nearly one hundred years ago. The river, by accretion or avulsion, could have created new tribal lands in Blackbird Bend which may not be acquired by adverse possession, statutes of limitation or laches. Another genuine issue of fact concerns the date of defendants' entry upon lands in Blackbird Bend and the sufficiency of the acts defendants allege constitute an adverse possession. Whether the Tribe ever acquiesced in defendants' possession of Blackbird Bend is an issue of fact.

Moreover, with respect to lands within the Barrett Survey which belong to the Tribe, the jury may find the defendants committed a trespass. As long as "the slightest doubt remains as to the facts," there exists a genuine issue. *Armco Steel Corp.* v. *Realty Investment Co.*, 273 F.2d 483 (8th Cir. 1967).

In view of the complexity of the evidence and claims presented in this case through trial and appeals lasting seven years, this Court cannot conceive of an action less appropriately disposed of by summary judgment.

The foregoing constitutes this Court's Findings of Fact and Conclusions of Law.

BY THE COURT:

/s/ Andrew W. Bogue
ANDREW W. BOGUE
Chief Judge
United States District Court

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No. 83-952

In The

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN R. WILSON, et al.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR JOHN R. WILSON, et al. IN OPPOSITION

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STATEMENT

The respondents generally accept the petitioner's Statement with respect to the history of the case. We disagree, however, with certain matters asserted by the petitioner in its Statement, and we would call attention to certain facts not included in that Statement.

1. The earlier opinions of the district court[1], the court of appeals[2] and this Court[3], have recognized that the respondents and their predecessors occupied the Barrett Survey area for many years prior to this litigation which began in 1975 when the respondents were removed from possession by an injunction obtained by the Omaha Indian Tribe. The district court made the following findings with respect to the occupancy.

> Although these factors did not influence the decision of the Court in these findings, the Court feels compelled to comment upon the history of the activities of the defendants and their predecessors as it relates to the Blackbird Bend area. The evidence is without dispute that the Omaha Indian Tribe has not been in either possession or occupancy of the land within the Barrett Survey Meander since 1912 or before. There is considerable evidence in the record that the defendant's predecessor in title, Joe Kirk, came upon the land in approximately 1915 and commenced to clear and farm such areas of it as could be made farmable. From that time forward, the land was in the process of being cleared, drained, leveled, and improved for agricultural purposes by Kirk and others. There is in evidence in this case a certified copy of the Judgment and Decree of Cause No. 10093, District Court of Iowa in and for Monona County, entitled *George D. Whitney v. Joseph A. Kirk and Bertha Kirk,* wherein the Iowa District Court on November 30, 1928, concluded that Joseph A. Kirk was the owner of the Northeast Quarter of Section 19, Township 84 North, Range 46 West, lying upon the high bank, and that all land lying adjacent

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1. *United States v. Wilson,* 433 F.Supp. 57, 69, 86-87 (N.D. Iowa 1977).

2. *Omaha Indian Tribe v. Wilson,* 575 F.2d 620, 622 (8th Cir. 1978).

3. *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 659 (1979).

thereto was accretion land and as such, Kirk was entitled to title and possession of all lands lying south of a line commencing at the southwest corner of the Northeast Quarter of Section 19, Township 84, Range 46, and running in a southwesterly direction at right angles to the bed of the Missouri River. . . . (Exhibit W-CC). . . . Also in evidence, are Wilson Exhibits AA and BB, which are quiet title actions brought by the defendants or their predecessors in interest, of substantially all of the land with the Barrett Meander Survey, which quieted title to the riparian owners in 1962 and 1963 as against all persons except the United States. Finally, there is evidence in this case Exhibit W-D3 which is the Certificate of the Monona County Treasurer, showing payment of the taxes on the land within the Blackbird Bend by the defendants or their predecessors, since said land was placed upon the tax rolls.

There is no evidence of any possession by the Omaha Indian Tribe or of any improvements to the land by the Omaha Indian Tribe at any time even since temporary possession was granted by this Court by Temporary Injunction in 1975.

United States v. Wilson, 433 F.Supp. 57, 86, 87 (N.D. Iowa 1977).

These findings were not disturbed by the court of appeals or this Court.[4]

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4. In *Omaha Indian Tribe v. Wilson*, 575 F.2d at 622, the court of appeals noted "From at least the 1940's until April 2, 1975 the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute."

This Court also commented on the occupancy of the Barrett Survey land by respondents:

> As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Wilson v. Omaha Indian Tribe, 442 U.S. at 659.

The record in this case is clear that the respondents and their predecessors in interest were good faith occupiers of the land under color and claim of title and that during their occupancy they made valuable improvements to the land, converting it from swamp and timber land into valuable farm land.[5]

2. The petitioner in the opening paragraph of its Statement says: "This case concerns the jurisdiction of the federal courts to entertain counterclaims seeking monetary relief against the United States when the government initiates a quiet title action to establish ownership and regain possession of land belonging to an Indian tribe." Pet. 2.

This is not an accurate interpretation of either the position of the respondents with respect to the matter of improvements or the holding of the court of appeals on this issue. The obligation of the petitioner to reimburse respondents for the improvements made to the Barrett Survey land is based upon the equitable doctrine that "one who seeks equity must do equity". The court of appeals applied the following rules in holding in favor of the respondents:

> In a quiet title action where the plaintiff seeks the equitable remedy of a decree quieting title in himself, it is generally accepted that the plaintiff must do equity by reimbursing the defendant for the value of improvements as a condition precedent to

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5. The district court noted that ". . . a substantial portion was cleared of trees, leveled, fenced, drained, roads built, and cultivated. It is now a valuable and productive tract of farm ground, as evidenced by the purchase of 2,180 acres by defendant Wilson in 1972 by Warranty Deed for a consideration valued at $1,685,000 . . ." 433 F.Supp. at 69.

> his right to relief. [citations omitted] . . . We see no reason why on the facts of this case the United States should be excused from the application of this equitable doctrine. It is well established that the United States is subject to general principles of equity when seeking an equitable remedy [citations omitted]. Pet. App. 21a, 22a.

The court of appeals rejected the petitioner's claim of sovereign immunity stating: "Because the duty to pay for the value of improvements is an element of the government's own claim, a condition precedent to the right of the United States to recover, we find the doctrine of sovereign immunity is inapplicable." Pet. App. 22a, 23a.

This passage states what we believe to be the essence of the matter—that the obligation of the petitioner to pay for the value of the permanent improvements made to the land is part of the petitioner's own case. That obligation does not arise by virtue of any counterclaim asserted by the respondents.

3. The petitioner twice states that no further title issues remain as to the Barrett Survey area. Pet. 2, 5. These statements also demonstrate the petitioner's misconception of the equitable nature of the improvements issue since, as the court of appeals correctly stated, ". . . the duty to pay for the value of improvements is an element of the government's own claim. . . . " Pet. App. 22a, 23a. The title question cannot ultimately be resolved without a resolution of this matter.

4. The petitioner states: "As an alternative basis for recovery, respondents argued that Nebraska law entitled them to recover for improvements, relying on the Nebraska Occupants and Claimants Act, Neb. Rev. Stat. §§ 76-301 to 76-311 (reissue 1981) . . ." Pet. 6.

We have consistently stated in our briefs in the district court and in the court of appeals that the petitioner's obligation to pay for improvements is based upon general principles of equity which federal courts sitting in equity have traditionally applied in similar situations. We have never contended that the Nebraska Occupying Claimants Act applies directly to this dispute. We have maintained, however, relying on *Leighton v. Young*, 52 F. 439 (8th Cir. 1892), that the court in exercise of its equitable powers and in fashioning a decree in this case should look to and be guided by the substantive rules of the Nebraska Occupying Claimants Act[6].

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6. *Leighton* was a dispute over ownership of Nebraska land. It involved two separate actions. In the first action the owner sued the occupying claimant in ejectment and obtained a jury verdict and judgment for possession. In the second action the occupying claimant sued in equity to enjoin the owner from being placed in possession by a writ of execution until the owner had paid the value of improvements made to the land by the occupant. The district court in the second action appointed a special master who made an appraisal and report in general conformity with the Nebraska Occupying Claimants Act. The court of appeals upheld that procedure noting the equitable origin and basis of the Act but noting also that, while its substantive provisions should be followed, the federal court need not conform to the exact procedures of the Act.

> The case being one of equitable cognizance, the federal court, sitting in chancery, will execute the law by the customary chancery methods and modes of proceeding, and, if they are not adequate to the purpose, will devise methods that are. The equity practice in the courts of the United States is not regulated by the state statutes. Nevertheless, in the exercise of its chancery powers, the court below might have conformed to the state practice by directing the marshal to summon three appraisers, and this probably would have been the better way, as it is desirable, when a court of the United States is enforcing a right created by state statute, to follow, as near as may be, the practice prescribed by the state statute for the enforcement of the right secured thereby. But it was equally within the discretion of the court to appoint one or more commissioners, or to refer the matter, as was done, to a master.
>
> 52 F. at 443.

ARGUMENT

Summary of Argument

In ruling as it did on the improvements issue the court of appeals applied the very fundamental equity doctrine that "one who seeks equity must do equity". The court's ruling is consistent with a long line of decisions holding the United States subject to that principle when it seeks equitable relief. It does not conflict with any of the decisions of this Court dealing with the issue of the sovereign immunity of the United States. Nothing in the circumstances of that ruling warrants review by this Court.

Reasons For Denying the Petition

1. Courts of equity have traditionally required the true owner, as a condition precedent to a decree quieting title in his favor, to reimburse a good faith occupant for the value of the permanent improvements which the occupant has made to the land. The courts have done so under the doctrine that "one who seeks equity must do equity".[7] That doctrine has been recognized in the de-

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7. One of the earliest and most often cited federal cases to discuss the principle is *Bright v. Boyd*, 4 Fed. Cas. 127 (C.C. Me. 1841) and 4 Fed. Cas. 134 (C.C. Me. 1843). In *Bright*, the true owner established a superior title in an action at law. Thereafter, the occupant brought an original bill in equity to establish his right to recover the value of buildings and other improvements made to the property. The Court granted the bill, and in the two opinions, Justice Story provides a lucid explanation of the equitable basis for the decision.

> So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon

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cisions of this Court. In *Williams v. Gibbes*, 58 U.S. 535, 538 (1858) the Court said:

> Another principle which we think applicable to this case is to be found in a class of cases where a bona fide purchaser, for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner, on account of some latent informity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity.

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the terms of making compensation to such bona fide possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner. See, also, 2 Story, Eq. Jur. § 799b, and note; Id. §§ 1237, 1238. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity, must do equity.

4 Fed. Cas. at 133.

I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation.

4 Fed. Cas. at 135.

See, generally: 57 ALR 2d 263.

And, in *Searl v. School District No. 2*, 133 U.S. 553, 561 (1890) the Court said:

> The civil law recognized the principle of reimbursing to the bona fide possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the Betterment Laws of the several States proceed upon that equitable view. The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice; and in its application as a shield of protection, the term "vested rights" is not used in any narrow sense, but as implying a vested interest of which the individual cannot be deprived arbitrarily without injustice. The general welfare and public policy must be regarded, and the equal and impartial protection of the interests of all.

The equitable doctrine applied by the court of appeals in the instant case is one which is firmly established in the equity jurisprudence of the federal courts. That doctrine would apply without question if the title dispute in this case were solely between private litigants.

2. Sovereign immunity does not shield the United States from the obligation to do equity when it seeks equity.[8] Lower federal court decisions to that effect[9] have

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8. *Brent v. The Bank of Washington*, 10 Pet. 596; *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954), *Jacobs v. United States*, 239 F.2d 459 (4th Cir. 1956), *cert. denied* 353 U.S. 904 (1957); *Ehrlich v. United States*, 252 F.2d 772 (5th Cir. 1958); *United States v. Desert Gold Mining Co.*, 448 F.2d 1230 (9th Cir. 1971); *United States v. Belt*, 47 F.Supp. 239 (D.C. Col. 1942), *vacated*, 319 U.S. 521, *aff'd*, 142 F.2d 761 (D.C. Cir. 1944). *United States v. Fallbrook Pub. Util. Dist.*, 193 F.Supp. 342 (S.D. Cal. 1961).

9. E. g., *Lacy v. United States, supra*, note 8; *United States v. Belt*, supra, note 8.

cited this Court's decision in *Luckenbach S.S. Co., v. Norwegian Barque Thekla,* 266 U.S. 328, 339-340, (1924), an admiralty case involving a cross libel against a ship requisitioned by the United States, in which the Court stated:

> When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it.

When the United States invokes the equity powers of the federal courts to protect or preserve its interests in property, those courts have the authority to withhold relief until the United States performs the equitable conditions precedent to obtaining that relief.[10]

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10. In *Lacy v. United States, supra,* note 8, the court would not order the removal of buildings from an easement claimed by the United States until the United States paid just compensation.

> The Government when applying for relief in a court of equity is as much bound to do equity as is a private litigant. United States v. Belt, D.C., 47 F.Supp. 239, vacated 319 U.S. 521, 63 S.Ct. 1278, 87 L.Ed. 1559, affirmed 79 U.S. App. D.C. 87, 142 F.2d 761; United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338, 26 S.Ct. 282, 50 L.Ed. 499; Daniell v. Sherrill, Fla., 48 So.2d 736, 737, 23 L.R.A.2d 1410.
>
> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." United States v. The Thekla, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313. It is true that that principle cannot be pressed to the extent of waiving the sovereign immunity to suit by way of counterclaim. United States v. Shaw, 309 U.S. 495, 502, 60 S.Ct. 659, 84

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3. The petitioner contends that the decision of the court of appeals is in conflict with this Court's decisions, principally, *United States v. Shaw*, 309 U.S. 495 (1940) and *United States v. United States Fidelity & Guaranty*

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L.Ed. 888; In re Greenstreet, Inc., 7 Cir., 209 F.2d 660, 666; Oyster Shell Products Corp. v. United States, 5 Cir., 197 F. 2d 1022. The Government, however, is still bound to do equity and, as a condition precedent to relief in this case, either to agree upon and pay to the property owner such compensation as it may owe him or, failing such agreement, to file the necessary proceedings for the ascertainment of such compensation.

216 F.2d at 225-226.

In *Jacobs v. United States, supra,* note 8, the court would not order delivery of construction drawings or records to the United States until the United States paid for the work performed.

In imposing as a condition of the decree that the government pay to the contractor the sum of $20,072.91, being the amounts found by the court to be due the contractor under the contract and for guarding for the government the secrecy of the records and drawings, the court was merely applying the well settled principle that he who seeks equity must do equity, a principle binding upon the government, as well as upon individuals. United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 26 S.Ct. 282, 50 L.Ed. 499; Lacy v. United States, 5 Cir. 216 F.2d 223.

239 F.2d at 461.

In *Ehrlich v. United States,* supra, note 8, the court would not rescind a conveyance by the United States on grounds of fraud by the grantee until the United States refunded the purchase price to the grantee.

This is a suit in equity to rescind a sale on the ground of fraud. The general rule governing such cases is that he who seeks equity must do equity; that one cannot rescind a sale, even for fraud, without first making restitution of the purchase price. Thackrah v. Haas, 1886, 119 U.S. 499, 7 S.Ct. 311, 30 L.Ed. 486; Grymes v. Sanders, 1876, 93 U.S. 55, 23 L.Ed. 798; Neblett v. Macfarland, 1875, 92 U.S. 101,

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Co., 309 U.S. 506 (1940) which held that, absent an authorizing statute, the sovereign immunity of the United States precludes counterclaims against the United States for monetary judgments. The differences, however, between those cases and the instant case are apparent.

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23 L.Ed. 471. The party seeking rescission must undertake to perform whatever conditions the Court may decide to be equitable, if it eventually declares the right of rescission.

252 F.2d at 776.

In *United States v. Desert Gold Mining Co.*, supra, note 8, the court would not cancel a conveyance by the United States until the United States made payment to a good faith mortgagee without notice of defects.

In issuing that opinion [the court's prior opinion at 433 F. 2d 713 holding a mortgage to be a valid lien as against the Government] we believed, *inter alia*, that since the Government had sought the intervention of equity, it was in no position to protest its corresponding obligation to do equity in order to obtain the equitable relief that it sought.

448 F.2d at 1231.

In *United States v. Belt*, supra, note 8, the court held that the United States could not reclaim title to certain parcels of land, because of allegedly invalid conveyances, unless it made compensation in accordance with the terms of the conveyances.

I have further concluded that granting arguendo, plaintiff's position in the case at bar should be found to be correct in point of fact, nevertheless the Government is not in a position to urge this point before this court of equity without at least an offer to award the defendants compensation equal to the value of the land.

* * *

It cannot be questioned that the Government, when applying for relief in a court of equity, is as much bound to do equity as a private litigant. Brent v. Bank of Washington, 10 Pet. 596, 614, 9 L.Ed. 547, 555; McKnight v. United States, 98 U.S. 179, 25 L.Ed. 115; United States v. Detroit T. & L. Co., 200 U.S. 321, 26 S.Ct. 282, 50 L.Ed. 499.

47 F.Supp. at 240-241.

The counterclaims in *Shaw*, and *U.S.F.&G. Co.*, sought affirmative monetary judgments. The merits of the counterclaims were independent of the merits of the claims of the United States. In each case the judgment sought on the counterclaim would be res judicata in any subsequent proceedings, even if there could be no execution on the judgment.

In contrast, the rule requiring the true owner to reimburse a good faith occupant for improvements originates in the desire of courts of equity to do complete justice with respect to the subject matter. In the language of the court of appeals in the instant case, the obligation to make reimbursement for improvements under the doctrine that "he who seeks equity must do equity" is "an element of the government's own claim" Pet. App. 21-22a.

This Court's decision in *The Thekla*, 266 U.S. 328 (1924), establishes the basis upon which the courts may require the United States to accept whatever obligations are incidental to the accomplishment of complete justice with regard to the subject matter in controversy. It is upon that basis that the federal courts, uniformly, have seen fit where appropriate to impose equitable conditions upon the granting of equitable relief to the United States.[11] The Fourth Circuit Court of Appeals in *Jacobs v. United States*, 239 F.2d 459, 461-462 (4th Cir. 1956), *cert. denied*, 353 U.S. 904 (1957) states the matter succintly:

> We quite agree that the fact that the court is granting relief to the government does not authorize it to

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11. See cases cited note 8 *supra*.

> entertain counterclaims which amount to suits which Congress has not authorized. United States v. Shaw, 309 U.S. 495, 502, 60 S.Ct. 659, 84 L.Ed. 888. This, however, is a very different thing from conditioning the granting of equitable relief upon the doing of justice with respect to the subject matter of the relief granted.

The decision of the court of appeals does not conflict with this Court's decisions in *Shaw, and U.S.F.&G. Co.*

4. The petitioner contends that this Court's decisions in *Pan American Petroleum & Transport Co. v. United States,* 273 U.S. 456 (1927) and *Heckman v. United States,* 224 U.S. 413 (1912) stand for the proposition that general principles of equity will not apply to frustrate public policy. The petitioner argues that the ruling of the court of appeals on the improvements issue in the instant case is in conflict with those decisions. Pet. 12-14.

Pan American, and *Heckman,* are, however readily distinguishable. The refusal of this Court in *Pan American* to require the United States to pay for what it received under the leases and contracts which were declared invalid in that case must be viewed against the background of the massive fraud, conspiracy and bribery of the Teapot Dome scandal.[12]

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12. In refusing equitable relief to the defendants the Court stated:

> The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud. . . . The Petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.

273 U.S. at 509.

Similarly, in *Heckman*, this Court refused to require the United States to refund the purchase price as a precondition to obtaining relief in the form of cancellation of conveyances of restricted lands made by Indian allottees. The Court noted that those who dealt with the Indians knew or should have known of the restrictions.[13]

The Court in *Pan American*, cited two other cases, *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1917) and *Causey v. United States*, 240 U.S. 399, (1916) as examples of other situations where it would refuse to require the United States to make restitution as a condition to obtaining the cancellation of patents.

In all of these cases, however, there was either fraudulent conduct or at least knowingly wrongful conduct by the parties seeking restitution through the court's equitable powers. By contrast, the equitable doctrine requiring payment for improvements as a precondition to a quiet title decree presupposes the innocence and good faith of the occupation and the absence of intentional wrongdoing. The application by the court of appeals of that doctrine in the instant case is not in conflict with

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13. In *Heckman*, the Court said:

> The restrictions [against alienation of allotted Indian lands] were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute.
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> 224 U.S. at 447.

The Court also noted that the very improvidence of the Indian allottees, which the restrictions were intended to protect against, would, as a practical matter, mean in most cases that the allottee would not be able to make restitution and recover the land.

Pan American, Heckman, and the other cases discussed above.

5. The petitioner maintains that it is improper to require it to pay for the value of the improvements to the land because it has not attempted to claim rents and profits. Pet. 9, 15. However, there is nothing in the decision of the court of appeals which forecloses an inquiry into the entitlement of the United States or the Tribe to rents and profits. The Tribe in fact has a pending claim for trespass damages. The district court on remand and in the exercise of its equity powers has complete authority to resolve all further claims involving the Barrett Survey area including the rights of the United States and the Tribe, if any, for rents and profits and the corresponding rights of the respondents to recover for the value which they have added to the land during their occupancy. The court of appeals noted this authority and urged the district court and the parties to utilize it to end this litigation:

> It is "well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." *Hendershott v. Shipman,* 231 P.2d 481, 483 (Cal. 1951). *Cf Bjornstad v. Fish,* 87 N.W.2d 1, 8 (Ia. 957). The United States has heretofore made no claim for recovery of rents and profits. However, the Tribe brought an action for ejectment and for trespass damages, which was severed. We urge the parties and the district court to consider consolidation of all remaining claims arising out of the possession or lack of possession of the Barrett Survey area during the period in controversy, so that the claims may be resolved in the most judicially efficient manner.
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> Pet. App. 23a.

6. The petitioner argues that the decision of the court of appeals will seriously affect the ability of the United States to protect the property interests of Indian tribes. Pet. 15-18. We believe that the petitioner overstates the matter.

In exercising its equitable powers a court may fashion its decree to suit the particular circumstances of the case before it. The court of appeals in ruling in favor of the respondents stated: "We see no reason why *on the facts of this case* the United States should be excused from the application of this equitable doctrine". Pet. App. 22a. (emphasis added).

The "facts of this case" involve an unusual and perhaps unique set of circumstances. The respondents have been divested of land which they had every right to believe was Iowa riparian land to which they had good title. Since 1912 they or their predecessors drained, cleared and cultivated that land, as the land emerged on the Iowa side of the river, and brought quiet title actions to establish their titles in the honest belief that it was not subject to claims by the United States or the Tribe.

Although the land in question lies immediately across the river from the Omaha Reservation, such that the occupation of the respondents and their predecessors was obvious to the Tribe, the petitioner and the Tribe stood mute for a period of almost seventy years, apparently never believing themselves that they had any interest in these lands. In the end, the respondents face the loss of this land because they were unable to meet a nearly impossible burden of proof under 25 USC § 194—a statute never invoked in any prior reported case until this one—of prov-

ing the nature of the movements of the Missouri River occurring over a century ago.[14]

The land which the petitioner and the Tribe will recover is a far more valuable and productive piece of land than it would have been without the efforts of the respondents and their predecessors.

We find it difficult to believe that "public policy" can prevent a court of equity, in a case such as this, from ex-

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14. 25 USC §194 states:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

The court of appeals and the district have both commented on the pivotal effect of 25 USC §194 in this litigation. The court of appeals observed:

> We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an onerous burden. This may seem to be an injustice when one considers that the defendants or their predecessors have possessed and continuously farmed the land without protest for nearly 40 years.
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> *Omaha Indian Tribe v. Wilson*, 575 F.2d at 651.

The district court was even more emphatic:

> There can be no doubt, however, that 25 U.S.C. §194 has been a determinative factor in the outcome of this case. In the Appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago. This Court firmly believes the statute thereby provided the Tribe an unconscionable advantage in this litigation. Moreover, the statute arguably operated to deprive these defendants of their constitutional right to equal protection under the law.
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> Pet. App. 66a.

ercising its traditional equitable powers, as the court of appeals has done, to do justice to all parties by requiring that the respondents be compensated for the permanent value which they have added to the land and which will inure to the benefit of the petitioner and the Tribe.

CONCLUSION

For the reasons stated above we respectfully submit that the decision of the court of appeals in this case does not warrant review by this Court and that the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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